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IN THE

Supreme Court of the United States

October Term, 1979

No. .....

~~79~~-923

ALAN L. STEIN, AS SECRETARY OF THE BUSINESS AND TRANSPORTATION AGENCY OF THE STATE OF CALIFORNIA,

Appellant,

vs.

CONFERENCE OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS, a California corporation, etc., and FEDERAL HOME LOAN BANK BOARD,

Appellees.

On Appeal From the United States Court of Appeals for the Ninth Circuit

JURISDICTIONAL STATEMENT

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IN THE

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No. .....

ALAN L. STEIN, AS SECRETARY OF THE BUSINESS AND TRANSPORTATION AGENCY OF THE STATE OF CALIFORNIA,
Appellant,

vs.

CONFERENCE OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS, a California corporation, etc., and FEDERAL HOME LOAN BANK BOARD,
Appellees.

On Appeal From the United States Court of Appeals for the Ninth Circuit

JURISDICTIONAL STATEMENT

Alan L. Stein, as Secretary of the Business and Transportation Agency of the State of California, appeals from the final judgment of the United States Court of Appeals for the Ninth Circuit holding that the California Housing Financial Discrimination Act of 1977, CAL. HEALTH & SAFETY CODE §§ 35800-35854 (West Supp. 1979), insofar as it applies to

federally-chartered savings and loan associations, is unconstitutional in that it violates Article VI, cl. 2 of the United States Constitution.[1]

I
OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit rendered on September 26, 1979 appears in the Appendix hereto at page 1 thereof (also at 604 F.2d 1256 (9th Cir. 1979)).

The "Statement of Intended Decision" and Findings of Fact and Conclusions of Law rendered by the United States District Court for the Eastern District of California are included in the Appendix hereto, commencing at pages 11 and 16 thereof.

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[1]The action was commenced by the following plaintiffs: Conference of Federal Savings and Loan Associations, Alameda Federal Savings and Loan Association, Bay View Federal Savings and Loan Association, California Federal Savings and Loan Association, Coast Federal Savings and Loan Association, Eureka Federal Savings and Loan Association, First Federal Savings and Loan Association of San Diego, First Federal Savings and Loan Association of Santa Monica, First Federal Savings and Loan Association of South Pasadena, Home Federal Savings and Loan Association of San Diego, Orange Belt Federal Savings and Loan Association, Pacific Federal Savings and Loan Association, Peoples Federal Savings and Loan Association, Pomona First Federal Savings and Loan Association, Provident Federal Savings and Loan Association of Riverside, Redlands Federal Savings and Loan Association, Republic Federal Savings and Loan Association, San Francisco Federal Savings and Loan Association, Santa Fe Federal Savings and Loan Association, The Heart Federal Savings and Loan Association and Western Federal Savings and Loan Association. The defendants were Richard T. Silberman, the predecessor in office to Alan L. Stein, and the Federal Home Loan Bank Board. The Federal Home Loan Bank Board cross-claimed against the California Secretary of Business and Transportation.

II
JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit holding a California statute unconstitutional in part was entered on September 23, 1979. This appeal is being docketed in this Court within 90 days from the entry of judgment. A notice of appeal was filed with the United States Court of Appeals for the Ninth Circuit on November 19, 1979. Appendix at page 80.

The Court has jurisdiction over this appeal under 28 U.S.C. § 1254(2). *See Minnesota v. Northern States Power Co.*, 405 U.S. 1035 (1972), *aff'g.*, 447 F.2d 1143 (8th Cir. 1971); R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE, 64-65 (5th ed. 1978).

III
QUESTION PRESENTED

Whether the California Housing Financial Discrimination Act of 1977, CAL. HEALTH & SAFETY CODE §§ 35800-35854 (West Supp. 1979), insofar as it applies to federally-chartered savings and loan associations, is preempted by federal law by virtue of the Home Owners' Loan Act of 1933, 12 U.S.C. §§ 1461-1470, notwithstanding provisions in Title VIII of the 1968 Civil Rights Act, 42 U.S.C. §§ 3610, 3615, and the Equal Credit Opportunity Act, 15 U.S.C. § 1691d, which expressly grant the states the power to regulate in the area of credit and antidiscrimination.

IV

CONSTITUTIONAL PROVISIONS AND STATUTES

The texts of the following laws are set forth in the Appendix:

United States Constitution, Article VI, clause 2 (Appendix at page 24);

CAL. HEALTH & SAFETY CODE, §§ *35800-35854 (West Supp. 1979) (California Housing Financial Discrimination Act of 1977 or "California Act")* (Appendix at page 25);

42 U.S.C. §§ 3610, 3615 (fair housing provisions of the Civil Rights Act of 1968 or "Title VIII") (Appendix at page 34);

15 U.S.C. § 1691d(e)-(g) (Equal Credit Opportunity Act or "ECOA") (Appendix at page 38);

12 U.S.C. §§ 1461-1470 (Home Owners' Loan Act of 1933 or "HOLA") (Appendix at page 40).

V

STATEMENT OF THE CASE

Effective January 1, 1977, the California Legislature enacted the Housing Financial Discrimination Act of 1977. CAL. HEALTH & SAFETY CODE § 35800-35854 (West Supp. 1979). The Legislature had found that certain financial institutions doing business in the state had sometimes denied financial assistance in certain areas or approved assistance on terms less favorable than usually offered in other geographic areas and that this practice had the effect of, *inter alia,* reducing the availability of family housing, impairing the value of property and perpetuating racially and economically segregated areas. *Id.* § 35801. Thus, the purposes of the California Act included: (1) preventing discrimination in the provision of financial assistance for financing or refinancing the purchase, construction, rehabilitation, or improvement of housing accommodations because of conditions, characteristics, or trends in a neighborhood or geographic area; (2) encouraging increased lending in neighborhoods in which conventional residential mortgage financing had previously been unavailable; (3) increasing the availability of housing accommodations to creditworthy persons; (4) providing decent, safe housing; and (5) preventing the abandonment and decay of neighborhoods in certain geographic areas. *Id.* § 35802.

The Legislature, in enacting the California Act, specifically prohibited discrimination in lending based on a consideration of the conditions, characteristics or trends in a neighborhood or geographic area surrounding the housing accommodation which was to be the security for the loan (such discrimination is commonly known as "redlining") and discrimination based on a consideration of race, color, religion, sex, marital status, national origin or ancestry. *See id.* §§ 35810-35812.

The California Act provides the Secretary with the authority to enforce the provisions of the Act. *Id.* §§ 35814-35823. In furtherance of this enforcement authority, California Health & Safety Code section 35830 specifies that applicants for financial assistance must be provided with a notice outlining the prohibitions against discrimination set forth in the Act and the right to seek review by the Secretary of the Business and Transportation Agency following the denial of any loan. The statute also requires that this

notice be posted in a conspicuous place for public inspection in the offices of the financial institutions.[2]

On February 6, 1978, plaintiffs-appellees, the Conference of Federal Savings & Loan Associations and certain individual associations (hereinafter collectively referred to as "Conference" or "plaintiffs"), filed this action against defendant-appellant Richard T. Silberman, the Secretary of the Business and Transportation Agency of the State of California (the present Secretary is Alan L. Stein) (hereinafter referred to as "California" or the "Secretary"), and defendant, the Federal Home Loan Bank Board (hereinafter sometimes referred to as "Board"). Clerk's Record on Appeal ("CR") 1-73.

Plaintiffs in their complaint sought a declaration that the California Act had been preempted by the provisions of HOLA. The Board answered the complaint by admitting the averments of the complaint, CR 76-77, and filed a cross-claim against the Secretary. The Board in its cross-claim asked for relief similar to that sought by the Conference. CR 77-83.

On March 7, 1978, the Conference filed a motion for partial summary judgment on behalf of plaintiffs with respect to their claim that the California Act

[2]The Court of Appeals' decision distinguishes between "procedural" and "substantive" nondiscrimination provisions in the California Act and holds the "procedural" provisions preempted, but does not reach the issue of whether "substantive" rights of borrowers under the California Act are preempted. Such a distinction is inexplicable. The only right to judicial relief the Act expressly provides to borrowers is the right to obtain review of agency action upon complaints. CAL. HEALTH & SAFETY CODE § 35823. Under the California Act borrowers have a right to have the state agency take action to prevent or remedy discrimination. Without the required notice and complaint procedures, potential borrowers would likely never be aware that they are victims of discrimination.

is preempted by federal law, CR 89-127, and a motion for entry of final judgment on that claim pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. CR 128-35. The Board then filed an amended cross-claim against the Secretary, adding a claim for injunctive relief to prevent the Secretary from enforcing the California Act against federal associations doing business in the State of California. CR 164-73. On March 13, 1978, the Secretary filed a motion to dismiss or in the alternative stay the action, CR 183-219, and a motion to strike. CR 174-82.

On March 20, 1978, the Board applied for a temporary restraining order, CR 348-54, and moved for a preliminary injunction to prohibit the Secretary from enforcing the Act as to federally-chartered savings and loan associations. CR 223-347. After a hearing, the court denied the temporary restraining order and set all of the pending motions for hearing on May 1, 1978. Reporter's Transcript.[3]

Neither plaintiff nor the Board presented any factual information concerning the application or effects of the federal or state laws in question. They simply referred to federal statutes and legal opinions rendered by the Board. CR 100-26. They did not point to any legislation precluding the state from attempting to prevent discrimination or "redlining" in connection with loans secured by California real property. There was no showing that the California Act would interfere

[3]Claims of plaintiffs and the Board that the associations might be subjected to financial penalties if they were in violation of state law were removed from the case when the Secretary and the Attorney General agreed not to claim any such penalties for alleged violations of the California Act that occurred prior to a final determination of whether the federal associations were required to comply with the California Act. CR 648-49.

with or frustrate or inhibit the operation of federal law.

The Secretary, on the other hand, submitted uncontradicted evidence showing that there was no conflict between state and federal law. This evidence demonstrated that existing California law did not purport to exempt federal savings and loans from complying with federal law; that nothing in state law inhibited federal associations from complying with federal law; that nothing in the California Act would compel federal savings and loans to make loans or issue reports or post notices in violation of federal law; that compliance with the California Act would not make compliance with federal law more difficult or expensive; and that there would be no harmful impact on federal savings and loan associations should they be required to comply with state law. CR 619-23.

In addition, uncontradicted evidence showed that the federally-chartered savings and loan associations utilize notes and deeds of trust which are executed in California and subject to California law. CR 802-05. These savings and loan associations do their lending business in California and deal with California real estate. CR 937. In fact, a prospectus filed with the Securities Exchange Commission by a member of the Conference specifically points out that the basic terms of the mortgages are dictated by California law. CR 952-62.

At the time of the commencement of the action there were Board regulations preventing federal associations from engaging in discrimination. These regulations did not deal specifically with redlining. 12 C.F.R. §§ 528.1-528.8 (1976). Neither these regulations nor

proposed Board regulations were the basis of the trial court's decision. CR 1097-101. There was no showing that the Board's proposed regulations, 43 Fed. Reg. 22332-22339 (1977), would conflict with state law.

The proposed Board regulations went into effect in May of 1978. 12 C.F.R. §§ 528.1-528.8 (1979). These regulations preclude discrimination in lending and deal with redlining. They also provide for posting of an "Equal Housing Lender Poster" and monitoring lending activity.[4]

On May 9, 1978, the trial court issued a "Statement of Intended Decision." CR 1097-101. On August 16, 1978, the court issued: (1) an order denying the Secretary's motion to dismiss or in the alternative to stay the action and motion to strike, CR 1120-23; (2) an order granting partial summary judgment in favor of plaintiffs[5] and denying preliminary injunctive relief without prejudice, CR 1124-29; and (3) findings of fact and conclusions of law, CR 1130-38. On August 18, 1978, the clerk of the court entered judgment against the Secretary. CR 1139.

The trial judge held that as a matter of law, the California Act could not be applied to federally-

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[4]Although these regulations were before the Court of Appeals, that court did not find it necessary to rely on them. Instead the court based its decision on HOLA. Nevertheless, it is clear that the regulations do not conflict with or purport to preempt state law. Interestingly, Board antidiscrimination regulations even suggest the applicability of state law, 12 C.F.R. § 529.8(3) ("any applicable proceeding under state or local law"). To the extent the Board issued a statement, resolution or opinion relating to preemption, such action does not have the effect of substantive law. *See* Chrysler Corp. v. Brown. ..... U.S. ....., 99 S.Ct. 1705, 1717-25.

[5]Plaintiffs asserted another claim relating to the validity of California's laws concerning other savings and loan practices. Neither the opinions below nor this appeal concern that claim.

chartered savings and loan institutions by virtue of the preemption doctrine because language contained in certain federal statutes granting the states powers "in no way limits the Federal Home Loan Bank Board's plenary regulatory power under the Home Owners' Loan Act of 1933, 12 U.S.C. §§ 1461, *et seq.*" The judge provided that final judgment would be entered so "that the parties may seek an immediate appeal of this ruling" and stated that, although the Board's motion for a preliminary injunction could be granted, it was unnecessary to do so. The judge added that if "circumstances should arise where such an injunction might be necessary in aid of this Court's jurisdiction or to protect and effectuate its judgment . . . the Court would entertain a renewal of the motion." CR 1097-101.[6] Thus, by the court's ruling, California was precluded from enforcing the California Act as to federally-chartered savings and loan associations.

On September 12, 1978, California filed its Notice of Appeal. CR 1140. In view of the fact that California was unable to enforce its laws as to federally-chartered savings and loan associations which do business in California and compete with other California financial institutions, California sought an expedited hearing of its appeal. The Court of Appeal, after the briefs were filed, granted an expedited appeal.[7]

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[6]Summary judgment was granted despite Supreme Court decisions suggesting the need for some factual findings in preemption cases. *See* Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977) (court must "consider the relationship between federal laws as they are interpreted and *applied*, not merely as they are written" (emphasis added)); De Canas v. Bica, 424 U.S. 351, 363-65 (1976); New York State Department of Social Services v. Dublino, 413 U.S. 405, 423 (1973).

[7]The Court of Appeals also granted an application of the NAACP Legal Defense and Educational Fund, Inc., to file an *amicus curiae* brief on behalf of California's position. *Amicus* contended that antiredlining regulations of the Federal Home Loan Bank Board are grounded in federal civil rights statutes which specifically allow state regulation in the area; that the intent of Congress under federal antidiscrimination laws was not to preempt state efforts; and that strong policy considerations dictate that federal savings and loan associations be subject to the same antidiscrimination laws as other lending institutions in California.

On September 26, 1979, the United States Court of Appeals for the Ninth Circuit affirmed the district court's judgment (Senior Ninth Circuit Judge Merrill, Ninth Circuit Judge Hug and Senior United States District Judge Port of the Northern District of New York). The Court of Appeals held that by virtue of HOLA, the California Act was unconstitutional insofar as it applied to federally-chartered savings and loan associations, regardless of the provisions of federal civil rights legislation.

VI
THE QUESTION IS SUBSTANTIAL

A. Introduction

The California Act, which is contained in the Health & Safety Code (and not in the Financial Code, which deals with the regulation of state financial institutions), does not purport to regulate federally-chartered institutions. Rather, it does what federal legislation encourages—it protects California citizens against discriminatory lending practices by all financial institutions doing business in California. There is no showing that the federal associations are subjected to conflicting regulation. Indeed, a federally-chartered institution generally only does business in its home state. *See* 12 C.F.R. § 545.6-6 (1979).

There are many state laws dealing with such health and safety matters as wages and working conditions, child labor and discrimination, which are applicable to federally-chartered institutions.[8] The California Act does not "regulate" federal institutions any more than do these laws.

Although the Federal Home Loan Bank Board has recently enacted regulations directed at redlining, the state should not be dependent upon changing policies and enforcement practices of a federal agency. Rather, states should be able to take steps to prevent discrimination, so long as those steps do not conflict with federal law.[9]

If the opinion of the Ninth Circuit Court of Appeals is left standing, (i) the applicability of all state health and welfare laws to federal associations doing business in the states will be in question, (ii) state efforts, encouraged by federal legislation, to prevent discrimination in lending and redlining will be inhibited, (iii) a

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[8]*See* CAL. LAB. CODE §§ 148-149 (West Supp. 1979 (California Occupational Safety Health Board); CAL. LAB. CODE §§ 200-240 (West 1971 & Supp. 1979) (payment of wages); CAL. LAB. CODE §§ 500-556 (West 1971) (working hours); CAL. LAB. CODE §§ 1171-1204 (West 1971 & Supp. 1979) (wages, hours and working conditions); CAL. LAB. CODE § 1183 (West Supp. 1970) (employers required to post wage orders); CAL. LAB. CODE §§ 1285-1311 (West 1971 & Supp. 1979) (minors); CAL. LAB. CODE §§ 1410-1433 (West 1971 & Supp. 1979) (fair employment practices); CAL. LAB. CODE §§ 2800-2805 (West 1971 & Supp. 1979) (obligation of employer); CAL. LAB. CODE §§ 3201-5317 (West 1971 & Supp. 1979) (workers' compensation), all of which apply to all employers and institutions in California, including those that are federally-chartered.

[9]The federal regulations resulted only after efforts and litigation by civil rights organizations, such as the NAACP Legal Defense and Educational Fund, Inc. *See Amicus* Brief of NAACP Legal Defense and Educational Fund, Inc. on behalf of California filed in the Court of Appeals in this case.

state will be totally dependent on the Board to prevent redlining and discrimination by certain institutions doing business in that state, (iv) federal associations, which utilize state lending laws for their benefit and do business in the states, will be immune from state laws designed to protect citizens from discrimination, and (v) preemption will have been implied despite federal civil rights legislation strongly suggesting nonpreemption.

Courts have referred to the broad reach of federal statutes regulating various federally-chartered institutions. *See, e.g., Cook County National Bank v. United States,* 107 U.S. 445, 448 (1883); *Commercial State Bank of Roseville v. Gidney,* 174 F.Supp. 770, 774 (D.D.C. 1959), *aff'd,* 278 F.2d 871 (D.C. Cir. 1960) (National Bank Act, 12 U.S.C. §§ 21-213); *United States v. Alabama,* 434 F.Supp. 64 (M.D. Ala. 1977) (Federal Credit Union Act, 12 U.S.C. §§ 1751-1795i). Yet, these acts have been held not to preclude the application of state law to federally-chartered institutions. *See, e.g., Anderson National Bank v. Luckett,* 321 U.S. 233, 241 (1944); *United States v. Alabama, supra.* In connection with its effect on state law, HOLA should not be treated differently than these analogous statutes. Since this Court has not dealt with the effect of HOLA upon state law, guidance and clarification from the Court on this issue should be welcome to state and federal agencies as well as to the financial community.

B. The Preemption Doctrine Should Not Be Applied in This Case

State legislation may be preempted by federal legislation only where Congress either *intended* preemption, or where there is a *conflict* between federal law and state law. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-59 (1978). This Court has repeatedly advised that preemption is "not lightly to be presumed." *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952), *cited with approval in New York State Department of Social Services v. Dublino*, 413 U.S. 405, 413 (1973). *Accord, Exxon v. Governor of Maryland*, 437 U.S. 117, 132 (1978) (the "Court is generally reluctant to infer preemption."). *See generally* Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 649 (1975) ("Cumulatively considered, the Burger Court decisions show a renewed emphasis on the state directed doctrine.").

There are sound policy reasons for such narrow application. If no preemption is found, Congress can always change the result by legislation; erroneous preemption, however, leaves the states impotent to correct the situation. *See Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 643 (1973) (Rehnquist, J., dissenting).

C. Congress Specifically Authorized the States to Regulate the Subjects of Discrimination and Redlining

There is not one word in HOLA providing for express preemption or dealing with the subject of discrimination in lending. Whatever authority the Board has in the area of antidiscrimination emanates principally from various federal statutes, including ECOA and

Title VIII. In its regulations, the Board itself lists several statutes as its source of authority, including Title VIII and ECOA.[10] The Board itself has, in effect, argued before at least one other court that its antidiscrimination regulations came from the Civil Rights Act of 1968. *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 494 (S.D. Okla. 1976).[11] In its regulations the Board provides that member institutions may not rely upon an appraisal which "the institution knows, or reasonably should know, is discriminatory on the basis of the age or location of the dwelling, or is discriminatory per se or in effect *under the Fair Housing Act of 1968* [Title VIII] *or the Equal Credit Opportunity Act*." 12 C.F.R. § 528.2a (a)(1979) (emphasis added). It follows that in determining whether Congress intended that there be preemption in the area of antidiscrimination, one must resort to these authorizing statutes.[12]

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[10]In its proposed regulations, the Board stated that it was implementing ECOA and Title VIII. *See* proposed regulations appearing in 42 Fed. Reg. 58182-86, 58953-56 (1977); 43 Fed. Reg. 22332-33 (1977). As noted *supra*, these regulations have been adopted. *See* 12 C.F.R. §§ 528.1-528.8 (1979).

No federal statute expressly prohibits "redlining." The Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801-2809, however, provides for *disclosure* of information which might demonstrate the existence of redlining, but such disclosure requirements are in effect only for a limited period of time.

[11]The Board asserted this position in an *amicus* brief in *Laufman*.

[12]This was the approach taken by a federal court in New Jersey which held that while states could not regulate national banks in the area of disclosure, the state's anti-discrimination and anti-redlining laws could be applied to national banks. National State Bank v. Long, 469 F. Supp. 1068 (D.N.J. 1979). In that case, the court did not resort to the National Bank Act, 12 U.S.C. § 21-215b; rather, it analyzed the

(This footnote is continued on next page)

1. ECOA

The Equal Credit Opportunity Act expressly provides that persons aggrieved by discrimination in lending may elect to seek relief either under the federal laws or *under applicable state law*. 15 U.S.C. § 1691d(e). Thus, Congress has explicitly stated that federal law does not preempt the field of antidiscrimination in lending. Moreover, federal associations cannot even argue the existence of federal preemption without first pressing their claims before the Board of Governors of the Federal Reserve System, which "is authorized to determine whether such inconsistencies exist." 15 U.S.C. § 1691d(f) ("The Board may not determine that any state law is inconsistent with any provision of the subchapter if the Board determines that such law gives greater protection to the applicant."). The record in this case discloses no claim before the Federal Reserve Board of Governors.[13]

That ECOA was designed to permit the states to legislate to proscribe redlining is not only clear from the statute itself, *see* 15 U.S.C. § 1691d(e)-(g) (1976), but also from its legislative history. Clearly "redlining" was within the intended ambit of ECOA. During House debate on the 1976 ECOA Amendments, Representative Wylie, the ranking minority member of the House Subcommittee on Consumer Affairs (which proposed the amendments), stated:

Home Mortgage Disclosure Act of 1975, 12 U.S.C. §§ 2801-2809, the Community Reinvestment Act of 1977, 12 U.S.C. §§ 2901-2905 and, more importantly, ECOA, *Cf.* Perpetual Federal Savings & Loan Ass'n., 90 F.T.C. 648, 661 (1977) (HOLA did not immunize federal associations from FTC rules relating to interlocking directorates or from antitrust laws).

[13]Federal savings and loan associations are "persons" subject to the provisions of ECOA. *See* 15 U.S.C. §1691a.

> "Although this bill does not specifically prohibit the practice of redlining, . . . [it] would indirectly prohibit such practice in that each individual applicant for credit must be considered on his own merits as to credit worthiness.
>
> The Honorable Arthur S. Flemming, Chairman of the U.S. Commission on Civil Rights, made note of this practice of redlining when he appeared at the hearings with supporting testimony that the practice is widespread. He said he supported this bill, because he felt this approach would, indeed, provide a neutral standard of credit worthiness, which would not include class discrimination and would, in fact, prohibit the practice of so-called red-lining." 121 CONG. REC. 16742-43 (1975) (remarks of Rep. Wylie).

See Pub. L. No. 94-239, § 5, 90 Stat. 253 (1976).

The House Conference Report shows that no preemption was intended by providing as follows:

> "Both the House bill and the Senate amendment contained provisions restricting an aggrieved applicant to a single recovery when a creditor's contract violates both state and federal law. With some technical changes, the Conference Report contains the Senate provision, which makes it clear that an applicant can bring only one lawsuit for monetary damages, but is not otherwise restricted in his or her remedies under state law and under this Act.
>
> The Conference Report also contains two provisions, patterned on similar sections of the Fair Credit Billing Act [15 U.S.C. § 1666j(a)-(b)] which make it clear that this Act does not preempt state law unless that law is inconsistent with the

> federal Act. Similarly, the Board [of Governors of the Federal Reserve System] is directed to exempt from the federal Act any classes of transactions which are subject to state law substantially similar or more protective than this Act. The provision also confirms that the permitted exemptions are from the 'requirements' of this Act and not from its remedial provisions." H.R. REP. NO. 94-873, 94th Cong., 2d Sess. 9 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 427, 429.

See also S. REP. NO. 94-589, 94th Cong., 2d Sess. 17 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, 403, 418-19.

This legislative history demonstrates that Congress intended only to establish minimum standards, not to preempt stricter regulation by the states. This fact is also demonstrated by the exemption from the provisions of federal law to be granted to classes of credit transactions within any state where state regulation is at least as protective of credit applicants as federal law. As was stated in the Senate Report:

> "The [prior] Equal Credit Opportunity Act leaves almost totally unclear the status of existing or future state laws dealing with discrimination in credit transactions. The Committee believes *that practices of discrimination are so abhorrent that federal law ought not foreclose the states from initiating their own laws unless those laws are incompatible with this legislation.* A similar policy has been adopted by the Congress with respect to Truth in Lending and more recently with the Fair Credit Billing Act.

> This bill clarifies the relationship of the Equal Credit Opportunity Act to state law in several ways.
>
> . . . .
>
> New subsections (f) and (g) of section 705 track similar language in the Fair Credit Billing Act. *State law is displaced by this Act only to the extent of inconsistencies* between them, and the Board [of Governors of the Federal Reserve System] may determine whether such inconsistencies exist. . . . *The Committee intends that those state laws which give greater protection to the applicant, as determined by the Board, shall apply equally to all credit granting institutions doing business in that state.*
>
> . . . Subsection 705(g) like comparable provisions in the Truth in Lending and Fair Credit Billing Acts, will permit classes of transactions in such states to be exempted from the substantive requirements and prohibitions of the federal law whenever the local law is substantially the same or stronger than the federal. To resolve an uncertainty under prior legislation, this bill makes clear that where such exemptions are made in favor of state law, the full remedial and enforcement structure of this Act remains in place. Thus aggrieved applicants retain their access to the federal courts, and the federal enforcement agencies may retain their authority to act against violators. It is expected, however, that these agencies will generally defer to the appropriate state officials." S. REP. NO. 94-589, 94th Cong., 2d Sess. 12-13 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 403, 414-15 (emphasis added).

Thus, Congress, in the statute which most closely deals with redlining and other forms of discrimination (the subject of the California Act in question), specifically permitted the states to enact and enforce statutes designed to eliminate discrimination in lending.

2. Title VIII

This Court has declared that "the 1968 Civil Rights Act specifically preserves and defers to local fair housing laws . . . so as not to preempt the local legislation." *Hunter v. Erickson*, 393 U.S. 385, 388 (1969). Congress specifically stated that nothing in that Act should "be construed to invalidate or limit any law of a state or political subdivision of a state . . . that grants, guarantees, or protects the same rights as are granted by this subchapter" 42 U.S.C. § 3616.[14]

Title VIII thus permits states, as well as the federal government, to redress discrimination. Given the language of that Act, it is clear that Congress did not intend that the Board have exclusive jurisdiction to deal with discrimination by federally-chartered savings and loan associations.[15]

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[14]*See also* 42 U.S.C. §§ 3608 (federal agencies shall cooperate with the Secretary of Housing and Urban Development and the Secretary shall cooperate and render technical assistance to federal agencies and states), 3610 (Secretary shall defer to state law and enforcement when state rights and remedies are substantially equivalent to those under federal law), 3615 (nonpreemption of state law), 3616 (Secretary may reimburse state officials for certain expenses incurred in implementing Act); Laufman v. Oakley Bldg. & Loan Co. 408 F. Supp. 489 (S.D. Ohio 1976).

[15]That Board regulations refer complainants to the Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 12 C.F.R. § 528.5 (1979), suggests that the Board recognizes that anti-discrimination activities are to be conducted pursuant to Title VIII provisions.

3. The Home Mortgage Disclosure Act

The Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801-2809, deals with the congressional finding that lending practices of some institutions may have contributed to the decline of certain geographic areas. *Id.* § 2801(a). Accordingly, Congress provided that banks and savings and loan institutions and other institutions maintain and provide certain statistical information. *Id.* § 2803. The terms of the statute terminate in 1980. *See id.* §§ 2808-2809. Section 2805 provides:

> "This chapter does not annul, alter, or affect, or exempt any State chartered depository institution subject to the provisions of this chapter from complying with the laws of any State or subdivision thereof with respect to public disclosure and recordkeeping by depositor institutions except to the extent that those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency. The Board [of Governors of the Federal Reserve Board] is authorized to determine whether such inconsistencies exist. . . ." *Id.* § 2805(a).

Appellees *infer* from section 2805 that Congress intended to preempt as to federally-chartered institutions. Even if any such preemption were intended, it would only apply to "public disclosure and recordkeeping." *National State Bank v. Long*, 469 F. Supp. 1068 (D.N.J. 1979). In fact, preemption makes no sense in light of the self-destruct provision of the statute. But more important is the fact that the legislative history of the statute conclusively establishes that Congress did not intend to preempt the subject of the California Act. The House Conference Report for the Home Mort-

gage Disclosure Act discussed the history of the House and Senate bills and concluded:

> *"The Senate conferees regard the House provision concerning Federal pre-emption as an exception to the pre-emption provisions of other consumer finance laws, including the Truth in Lending and the Fair Credit Billing Acts, which contain provisions similar to the Senate provisions of S. 1281.*
>
> In the case of mortgage disclosure, however, the conferees ont [*sic*] the part of the House strongly believe that subjecting a Federally chartered institution to state law would threaten the dual banking system.
>
> *With the understanding that this program goes only to the narrow area of geographical disclosure of mortgage lending statistics*, the Senate conferees agreed to the House provision, which is included in the conference report." H.R. CONF. REP. 94-726, 94th Cong., 1st Sess. 10 (1975) *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 2333, 2336 (emphasis added).

Thus, in passing the Home Mortgage Disclosure Act, Congress did not *expressly* preempt anything, and to the extent there was any preemption, it was only with regard "to the narrow area of geographical disclosure of mortgage lending statistics." Finally, the Report further demonstrates Congress' understanding that there was no preemption with respect to other antidiscrimination in lending programs.[16] *See also* 125 CONG. REC.

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[16]It should be noted that a Congressional Committee referred to the Board's rulings that federal savings and loan associations do not have to comply with state laws "even in those cases

S2165-66 (daily ed. March 7, 1979) (remarks of Senator Proxmire relating to the misuse by the Board in this case of his comments in regard to other legislation).

Congress has consistently declared its intention to "supplement rather than supplant" other laws which combat discrimination. *Alexander v. Gardner-Denver*, 415 U.S. 36, 48-49 (1974). In the area of civil rights, "legislative enactments . . . have long evinced a general intent to accord parallel or overlapping remedies against

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where the state law affords the borrower with a greater degree of protection." S. REP. NO. 93-902, 93d Cong., 2d Sess. 12 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6119, 6130. The Committee then stated,

> "During the Committee's consideration of this issue, some doubt was expressed that the Bank Board has the authority to preempt state law by regulation. . . .
>
> Unless there are overriding interests to the contrary, the federal government should not interfere with the efforts of a State to protect consumers. Federally chartered financial institutions are subject to a wide variety of State laws including laws dealing with taxes, branching, fire and building codes, conversions, usury and the like. The Committee sees no reason to make a special exception for consumer protection laws. . . .
>
> Even if a case could be made for preempting a State consumer protection law in a particular area, the power to reverse the judgment of a State should not be delegated to a federal administrative agency. The Comptroller of the Currency and the National Credit Union Administration are headed by one man, while the Federal Home Loan Bank Board is headed by three. These non-elected officials should not be given the power to over-rule by a stroke of the pen, the considered judgment of a State Legislature and its governor. Only Congress should make such a decision if it is to be made at all. . . .
>
> If federally chartered financial institutions are exempted from State consumer protection laws, these institutions would be given an unfair competitive advantage over State chartered financial institutions. If State chartered institutions are able to live under State consumer protections laws, there is no reason why federally chartered institutions should not abide by the same rules."

discrimination." *Id.* at 47.[17] The Home Mortgage Disclosure Act should be construed to supplement and not supplant state-law remedies against discrimination in lending.

D. HOLA Does Not Provide a Basis for Preemption

There should be no difficulty reconciling ECOA and Title VIII with HOLA. Unlike HOLA, ECOA and Title VIII specifically deal with discrimination.

> "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed Congressional intention to the contrary, to regard each as effective." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976), *quoted in SDC Development Corp. v. Mathews*, 542 F.2d 1116, 1120 (9th Cir. 1976).

Accord, International Union of Electrical, Radio & Machine Workers v. NLRB, 289 F.2d 757, 761 (D.C. Cir. 1960).[18]

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[17]First Federal Savings & Loan Ass'n v. Greenwald, 591 F.2d 417 (1st Cir. 1979) is not relevant because in that case the court held that federal regulations in question were promulgated pursuant to HOLA, and not pursuant to Real Estate Settlement Practices Act, 12 U.S.C. § 2616, and that there was an explicit conflict between federal regulations and state law. *Id.* at 425-26. The court specifically said it did not rely upon an occupation of the field theory. *Id.* at 426 n.16. In the instant case, Board regulations provide they are enacted pursuant to acts other than HOLA.

[18]There is no language in HOLA suggesting preemption. Even if there were, then the Court might be faced with an apparent conflict in legislation. In that event, of course, the later and more specific legislation (the Civil Rights legislation) would govern. *See, e.g.*, NLRB v. Drivers Local Union No. 639, 362 U.S. 274, 291-92 (1960) ("Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit.").

It cannot be argued seriously that state anti-discrimination legislation frustrates any purpose of HOLA, since presumably the federal government and California have the same goal—the elimination of discrimination in lending. The California Act does not preclude the federal regulation by the Board at all. The fact that federal and state antidiscrimination legislation may apply concurrently is no novelty. There are many areas where both federal and state laws are applicable—from securities regulation to criminal laws. *See William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 461 F. Supp. 410, 423 (N.D. Cal. 1978) (federal antitrust laws do not preempt state antitrust laws even though they have different standards). So long as the federal and state legislation "are directed toward the same overall purposes" there is no interference. *Id.*; *Rousseff v. Dean Witter & Co.*, 453 F. Supp. 774, 781 (N.D. Ind. 1978).

As a recent court decision noted: "The conflict necessary to invalidate state legislation under the Supremacy Clause requires more than a mere difference in the legislation." *Rousseff v. Dean Witter & Co. Inc.*, 453 F. Supp. 774, 781 (N.D. Ind. 1978). This Court recently stated:

> "A conflict will be found 'where compliance with both federal and state regulations is a physical impossibility . . .' or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978) (citations omitted).

Thus, if compliance with state law and federal law is not impossible or if the purpose of state law is

not "repugnant" to "the primary purpose" of the federal law, then there can be no preemption, even if state law imposes a higher standard than federal law. *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 141-44 (1963); *Rousseff v. Dean Witter & Co. Inc.,* 453 F. Supp. 774, 781-82 (N.D. Ind. 1978).

In the instant matter there is no conflict between federal statutes and state law. There has been no showing, for example, that state-chartered associations, which by virtue of federal insurance requirements are subject to both state and federal antidiscrimination laws, *see* 12 U.S.C. §§ 1724-1726; 12 C.F.R. §§ 528.1 (b)(1); 561.1-.37, cannot comply with both federal and state laws. Even if one could imagine some hypothetical conflict, it would not result in preemption. As this Court has stated: "But, '[i]n this as in other areas of coincident federal and state regulation, the "teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where non clearly exists."' . . . This sort of hypothetical conflict is not sufficient to warrant preemption." *Exxon v. Maryland,* 437 U.S. 117, 130-31 (1978) (citations omitted). *See also Goldstein v. California,* 412 U.S. 546, 554-55 (1973).

And assuming, *arguendo,* that the Board could preempt by regulation,[19] there is absolutely nothing

[19]It is "the intent of Congress" that determines whether there is preemption. Malone v. White Motor Corp., 435 U.S. 497, 504 (1978). Professor John Hetland has referred to the Board's efforts to preempt by regulation as "a doubtful premise in view of the scope of preemption permissible under powers delegated to it by Congress." J. Hetland, SECURED REAL PROPERTY TRANSACTIONS 32 (1977). "Only rarely does the [Supreme] Court respect clear expressions of agency intent to supersede or to preempt state laws." Hirsh, *Toward A*

in the Board regulations previously in effect or those now in effect that is inconsistent with the California Act. 12 C.F.R. §§ 528.1-528.8 (1976); 12 C.F.R. §§ 528.1-528.8 (1979). The federal regulations provide for non-discrimination in lending practices. The California Act has the same goal.

Just because HOLA establishes a comprehensive regulatory scheme does not require preemption. As this Court said:

> "We reject, to begin with, the contention that pre-emption is to be inferred merely from the comprehensive character of the federal work incentive provisions. . . . The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem . . . ." *New York State Department of Social Services v. Dublino,* 413 U.S. 405, 415 (1973) (citations omitted).

There is no question of any need for uniformity. A federally-chartered savings and loan association generally may do business only within one state. 12 C.F.R. § 546.6-6.

The Federal Home Loan Bank Board was authorized to adopt regulations reflecting the "best practices of local mutual thrift and home-financing institutions in the United States," HOLA, § 5(a), 12 U.S.C. § 1464(a). But this authorization does no more than

New View Of Federal Preemption [1972] U. ILL. L. FORUM 515, 551. As noted *supra,* Board statements, opinions, resolutions or material introductory to the regulations do not have the effect of law. Chrysler Corp. v. Brown, ... U.S. ..... 99 S.Ct. 1705 (1979).

provide standards for the Board's enactment of its regulations. Congress did not thereby purport to establish the scope of the Board's exclusive regulatory powers.

That the Board may have exclusive authority with respect to some activities of the federal associations does not mean it has exclusive authority over all aspects touching upon these institutions (such as discrimination, crimes, zoning, wages and working conditions, etc.). As the Court stated in *Kelly v. Washington*, 302 U.S. 1, 10 (1937):

> "There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside the limited field and otherwise permissible is not forbidden or displaced."

HOLA deals with chartering associations and regulating the internal operations of the associations and their staffs. The purpose and effect of HOLA is to insure financially sound lending practices and to provide for the health and stability of the federal associations. *See, e.g.*, 12 U.S.C. § 1464. Non-discrimination laws do not deal with institutional efficiency or reliability. Rather, they are calculated to eliminate racial and sex discrimination from the area of housing, loans and employment. Indeed, the Board was just one of many federal agencies given the responsibilitity to enforce civil rights and equal credit legislation. 42 U.S.C. § 1691.

There is nothing in HOLA or in its legislative history suggesting that state laws, such as the California Act,

should be or are preempted.[20] Such preemption would not only be contrary to later civil rights legislation, but would be inconsistent with established principles and public policy.

If HOLA somehow excludes the state from having state laws apply to federally-chartered institutions, those institutions would in effect be federal enclaves. Does HOLA suggest that state anti-deficiency legislation does not apply to federally-chartered institutions? Or that a crime occurring on the premises of a federally-chartered institution cannot be prosecuted by state authorities? Or that zoning laws do not apply to federally-chartered institutions? Or that state health and safety laws are not applicable to employees of the federal associations? Of course not. And it is equally absurd to say that the state cannot take steps to pre-

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[20]Assuming that the comments of the first Board Chairman are relevant (" 'The individual opinions of witnesses at hearings are of dubious value in interpretations of legislation.' " March v. United States, 506 F.2d 1306, 1314 n.30 (D.C. Cir. 1974)), he testified that the Board wanted "the latitude . . . to fit the regulations of the board and the associations to the states and the different needs." *Hearings on HOLA, H.R. 4980, Before House Comm. on Banking & Currency*, 73d Cong., 1st Sess. 7 (April 20, 1933) (statement of William F. Stevenson, Chairman, Federal Home Loan Bank Board). Board Chairman Stevenson's comment suggests that HOLA gave the Board discretion to facilitate the federal associations' compatability with local law, which local law would be applicable.

Moreover, one week prior to the enactment of HOLA, Chairman Stevenson stated to the United States Senate that the purpose of the Act was to provide access to long-term mortgage funding. He said: "These associations will be cooperative mutual saving funds, substantially all of which funds will be loaned on homes *in the community*. They will be organized under a Federal charter, but will operate locally and be managed locally." S. Doc. No. 74, 73d Cong., 1st Sess. 4 (1933) (statement of William F. Stevenson, Chairman, Federal Home Loan Bank Board) (emphasis added).

vent federally-chartered institutions from discriminating against California citizens.

There can be no question that the states' historic police powers have included the regulation of real property, lending and mortgage transactions, as well as discrimination. *See, e.g., United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591-92 (1973). It has never been thought that federal associations are or could be immune from all state law.[21]

By claiming immunity from California law protecting borrowers, while at the same time invoking and taking advantage of other California laws concerning real property laws, such as those concerning foreclosure and recording, the federal savings and loan associations are in effect asserting the right to pick and choose

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[21]Cases have found no preemption in the application of state law to federally-chartered savings and loan associations and other federally-chartered institutions. *See, e.g.*, Federal National Mtg. Ass'n v. Lefkowitz, 390 F. Supp. 1364, 1368-70 (S.D. N.Y. 1975) (state law on interests on impound accounts applies to national banks); Beverly Hills Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd., 371 F. Supp. 306, 313 (C.D. Cal. 1973); Durnin v. Allentown Fed. Sav. & Loan Ass'n 218 F. Supp. 716, 720-21 (E.D Pa. 1963) (state law applies to right to membership list); Garrett v Coast & Southern Fed. Sav. & Loan Ass'n, 9 Cal. 3d 731, 108 Cal. Rptr. 845, 511 P.2d 1197 (1973) (in holding late charge provisions invalid, the court impliedly found no preemption); Larwood Co. v. San Diego Fed. Sav. & Loan Ass'n, 185 Cal. App. 2d 450, 454-55, 8 Cal. Rptr. 362 (1960) (state courts may resolve disputes between federal associations and others; only internal matters must be resolved by the Board); Pearson v. First Fed. Sav. & Loan Ass'n, 149 So.2d 891, 895-96 (Fla. App. 1963) (state law applies to validity of proxies for election of federal association's directors); First Fed. Sav. & Loan Ass'n v. Norwood Realty Co., 212 Ga. 524, 93 S.E.2d 763 (1956) (state usury law applies to federal association); Derenco Inc. v. Benj. Franklin Fed. Sav. & Loan Ass'n, 281 Or. 533, 577 P.2d 477, *cert. denied*, 439 U.S. 1051 (1978).

those parts of California law which it will allow to be applied. Such selectivity cannot be permitted. *See First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966) (Court upheld state law as it applied to national banks, stating: "It is a strange argument that permits one to pick and choose what portion of the law binds him."). Moreover, it is clear that the lending documents of the plaintiffs are subject to and apply California law. CR 802-05, 937, 952-62. Thus, the associations have agreed to be bound by California law, at least as to rights of borrowers and potential borrowers. *See United States v. Crain*, 589 F.2d 996, 1000 (9th Cir. 1979) (state law defense of equitable subrogation available to SBA loan guarantor); *United States v. Stewart*, 523 F.2d 1070 (9th Cir. 1975) (California's anti-deficiency provision applied to a Veteran's Administration loan because the deed of trust provided that the contract was to be construed under California law); *United States v. MacKenzie*, 510 F.2d 39 (9th Cir. 1975) (debtor is entitled to the protection of state law with respect to the government's foreclosure of security for SBA loan).

Rather than doing what this Court said it was reluctant to do—infer preemption, *Exxon v. Governor of Maryland*, 437 U.S. 117, 132 (1978), courts should reconcile HOLA with both later federal law and state laws.

E. It Is Important That This Court Summarily Reverse or Hear This Case

After relying for years on the federal government, states are now assuming their responsibilities to prevent discrimination—in this case discrimination in lending.[22] If a state cannot apply uniform rules to financial institutions doing business in that state, the state's efforts will be handicapped. A citizen's rights will depend on the fortuitous factor of whether he or she applied to a state or federal association for a loan. If it is a federal association, the discrimination victim in California will have to complain either to distant federal authorities or not at all.

The Federal Home Loan Bank Board was given enforcement responsibility only because it was one of at least twelve agencies directed by Congress to apply civil rights and equal credit legislation to institutions it already regulated. 15 U.S.C. § 1691(c), 42 U.S.C. § 3608. If the determination as to whether state anti-discrimination law is preempted depends on general legislation establishing the federal agency, then whether an institution in California is subject to state law will depend on whether compliance with federal civil rights legislation is supervised by the Federal Home Loan Bank Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the administrator of the National Credit Union Administration, the Federal Reserve Board or other federal agencies. Such lack of uniformity would be manifestly inconsistent with the goal of ending discrimination and redlining.

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[22]In criticizing "the trend toward federal pre-emption of state law in financial affairs," Senator Morgan urged that "the notion that superior wisdom somehow resides only in Washington" be dispelled. *The State Advisor* (official publication of the National Association of State Savings and Loan Supervisors), Summer, 1978, at 5.

Dealing with the complex social and economic aspects of redlining requires local efforts. California and other states should not be precluded from dealing with these problems as they relate to a large segment of the financial institutions in the states.

It is important that this Court consider the issue presented by this case so as to deter confusion concerning and even abandonment of state antidiscrimination programs. In addition, as noted above, the broad language of preemption contained in the Ninth Circuit Court of Appeals opinion will call into question the applicability of many state laws in California—a state in which exists the greatest concentration of savings and loan institutions in the country. Moreover, it is important to the savings and loan industry to have a definitive resolution of this problem. Otherwise, it will be subjected to continued costly litigation and uncertainty.

Accordingly, for all of the foregoing reasons, California urges this Court either to reverse summarily the judgment below or hear oral argument in this case. The Court should note probable jurisdiction of this appeal.

Dated: December 7, 1979.

Respectfully submitted,

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APPENDIX.

Opinion.

In the United States Court of Appeals, for the Ninth Circuit.

Conference of Federal Savings and Loan Associations, a California corporation; and Alameda Federal Savings and Loan Association; Bay View Federal ings and Loan Association; California Federal Savi and Loan Association; Coast Federal Savings and Loan Association; Eureka Federal Savings and Loan Association; First Federal Savings and Loan Association of San Diego; First Federal Savings and Loan Association of Santa Monica; First Federal Savings and Loan Association of South Pasadena; Home Federal Savings and Loan Association of San Diego; Orange Belt Federal Savings and Loan Association; Pacific Federal Savings and Loan Association; Peoples Federal Savings and Loan Association; Pomona First Federal Savings and Loan Association; Provident Federal Savings and Loan Association of Riverside; Redlands Federal Savings and Loan Association; Republic Federal Savings and Loan Association; San Francisco Federal Savings and Loan Association; Santa Fe Federal Savings and Loan Association; the Heart Federal Savings and Loan Association; and Western Federal Savings and Loan Association, each of which is an association organized and operating as an instrumentality of the United States of America pursuant to Section 5(a) of the Home Owners' Loan Act of 1933, as amended [12 U.S.C. 1464(a)], Plaintiffs-Appellees, vs. Alan L. Stein, Successor in office to Richard T. Silberman, as Secretary of the Business and Transportation Agency of the State of California, Defendant-Appellant.

Federal Home Loan Bank Board, Cross Claimant-Appellee, vs. Alan L. Stein, etc., Cross Defendant-Appellant. No. 78-3201.

On Appeal from the United States District Court for the Eastern District of California.

Filed: Sept. 26, 1979.

Before: MERRILL and HUG, Circuit Judges, and PORT,* District Judge.

MERRILL, Circuit Judge:

The question presented on this appeal is whether the appellant, Secretary of the Business and Transportation Agency of the State of California, has power to regulate federal savings and loan associations under California's Housing Financial Discrimination Act of 1977, Cal. Health & Safety Code §§35800 *et seq.* (the Act). The district court held that he has not. It adjudged that "the [Federal Home Loan] Bank Board's exercise of its plenary regulatory power granted by Congress under [the Home Owners' Loan Act] preempts legislation by the State of California which attempts to subject federal savings and loan associations in California to state regulation and discipline in the area of anti-redlining practices." We affirm.

The Home Owners' Loan Act of 1933, 12 U.S.C. §§1461 *et seq.* (HOLA), was the result of congressional dissatisfaction with state law and practice in the financing of home construction. The first federal effort was through the Home Loan Bank Act of 1932. This failed to attack the problem satisfactorily. By 1933, 40 percent of all home loans in the United States

*Honorable Edmund Port, Senior United States District Judge of the Northern District of New York, sitting by designation.

were in default. Under date of April 13, 1933, President Roosevelt wrote the Congress:

> "I ask the Congress for legislation to protect small home-owners from foreclosure and relieve them of a portion of the burden of excessive interest and principal payments incurred during the period of higher values and higher earning power."

H.R. Doc. No. 19, 73d Cong., 1st Sess. 1618, 1702 (1933).

The result was HOLA, a radical and comprehensive response to the inadequacies of the existing state systems. A *federal* savings and loan system was created. The Federal Home Loan Bank Board (the Bank Board) was created with extremely broad powers to promulgate rules and regulations. 12 U.S.C. §1464(a) provides in part:

> "In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations' * * * and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States."

With reference to HOLA, one writer has stated:

> "* * * the states had developed a hodgepodge of savings and loan laws and regulations, and Congress hoped that FHLBB rules would set an

example for uniform and sound savings and loan regulations."

T. Marvell, *The Federal Home Loan Bank Board,* p. 26 (1969).

Pursuant to its authority, the Bank Board has promulgated regulations comprehensively dealing with the creation and operation of federal savings and loan associations. They deal with the manner in which capital may be raised by a federal association, earnings distributed, and withdrawals effectuated. See 12 C.F.R. §§545.1-.4. The powers of a federal savings and loan association to borrow, give security, issue notes, bonds, debentures or obligations are prescribed and authorized. 12 U.S.C. §1464(b)(2). The authority of a federal association to make and purchase loans and otherwise invest in real estate is subject to regulation. 12 U.S.C. §1464(c); 12 C.F.R. §545.6.

In recent years the Congress, in various civil rights statutes, has directed its attention to specific problems of borrowers relating to discrimination in the extending of credit and granting of loans. Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§3601 *et seq.;* The Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§1691 *et seq.;* The Home Mortgage Disclosure Act (HMDA), 12 U.S.C. §§2801 *et seq.* Language in these acts and in their legislative histories indicates a congressional intent that they shall not result in federal pre-emption of similar rights granted by state statutes. For example, ECOA states in part:

> "This subchapter does not annul, alter or affect, or exempt any person subject to the provisions of this subchapter, from complying with, the law of any State with respect to credit discrimination,

> except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. The [Federal Reserve] Board is authorized to determine whether such inconsistencies exist. The Board may not determine that any State law is inconsistent with any provision of this subchapter if the Board determines that such law gives greater protection to the applicant."

15 U.S.C. §1691d(f). The legislative history of ECOA contains a congressional statement to the following effect:

> "The Committee intends that those state laws which give greater protection to the applicant, as determined by the Board, shall apply equally to all credit granting institutions doing business in that state."

1976 U.S. Code Cong. & Ad. News 403, 414.

All of these acts provide the Bank Board with authority to promulgate rules and regulations prohibiting discrimination.

Pursuant to this authority regulations have been adopted by the Bank Board. They prohibit discrimination on the basis of race, color, religion and sex, and also prohibit red-lining - credit discrimination based on the characteristics of the neighborhood surrounding the borrower's dwelling. The regulations provide for monitoring of federal savings and loan associations by the Bank Board and establish an enforcement mechanism and require posting of notices in a prescribed form.

California's Housing Financial Discrimination Act of 1977 contains provisions prohibiting discrimination in lending "due * * * to the consideration of race,

color, religion, sex, marital status, national origin or ancestry" of the borrower, Cal. Health & Safety Code §35811, or "due * * * to the consideration of conditions * * * in the neighborhood or geographic area surrounding the housing accommodation" of the borrower, *id.* §35810 (the practice commonly known as "redlining"). The Act also provides: "The Secretary [of the Business and Transportation Agency] * * * shall monitor and investigate the lending patterns and practices of financial institutions for compliance * * *." *Id.* at §35815. The Act provides procedures for the resolution of complaints. Complaints may be filed with the Secretary by aggrieved applicants and the Secretary shall determine whether a violation has occurred, shall make findings, may issue cease and desist orders and impose penalties, all subject to judicial review. *Id.* §§35820-23. Notices in a prescribed form are required to be posted advising loan applicants of their rights and where complaints may be filed. *Id.* §35830.

After passage of the state act, appellant, by directive of December 15, 1977, notified all lending institutions operating in California, including federal savings and loan associations, that they would be required to abide by the provisions of the Act. The Federal Home Loan Bank Board responded with an opinion that the state act did not apply to federal savings and loan associations. On February 6, 1978, the Conference of Federal Savings and Loan Associations and certain federal associations, appellees herein, brought this suit against appellant, the Secretary of the state agency. The Bank Board was also sued nominally as a necessary party. Appellees sought a declaration that the Act was pre-empted by federal legislation and regulations. The Bank Board filed a cross claim against

appellant, seeking to enjoin him from attempting to enforce the provisions of the state act against the federal associations.

Appellant responded by bringing suit against the West Coast Federal Savings and Loan Association in Superior Court of San Mateo County, California (*People v. West Coast Federal Savings and Loan Ass'n*, No. 220012 (Cal.Super.Ct. Feb. 28, 1978). The defendant was charged with having violated state law by refusing to comply with appellant's directive of December 15, 1977. Appellant sought statutory damages in the sum of $2500 for each failure to post notice and each failure to supply a loan applicant with a copy of appellant's prescribed notice.

Jurisdiction

Appellant contends that there is no federal question involved in this action, and that the district court was without jurisdiction. He argues that pre-emption is only a federal defense to a potential state claim made under the Act, citing *Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 248 (1952). There, a carrier sought judgment declaring that it was engaged in interstate commerce and enjoining the Public Service Commission of Utah from interfering with its interstate shipments. The Court stated:

> "The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts. Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted."

Relief was denied.

That case is distinguishable, however. There, the majority concluded that there was no proof of any threatened or probable act by the state commission which might cause the irreparable injury essential to equitable relief or which could serve to create the actual controversy necessary for declaratory judgment jurisdiction. Here, an actual conflict exists created by the conflicting positions taken by appellant and the Bank Board. *See First Federal Savings and Loan Ass'n of Boston v. Greenwald*, 591 F.2d 417, 423 n. 8 (1st Cir. 1979).

> "Both the state and federal regulations are currently in effect, subjecting the associations to conflicting requirements * * *."

An actual justiciable controversy is thus presented.

Pre-Emption

Appellees argue and the district court held that the state act does not apply to federal savings and loan associations since the field of regulatory control is pre-empted by federal regulations.

Pre-emption of state legislation by federal acts arises from the Supremacy Clause, U.S. Const. art. VI, cl. 2. Courts begin their analysis of a potential pre-emption issue with the "assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). However, implicit pre-emption can be found where the scheme of federal regulation is so pervasive as to make reasonable the inference that there is no room for state action. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978).

Appellant urges that there is no pre-emption. He finds no conflict between the state and federal regulations. More importantly, he argues that the federal statutes which provide the authority for the Bank Board's regulations specifically call for no pre-emption of state statutes that provide equal or greater protection to borrowers.

The state act and the regulations of the Bank Board can be divided into two groups. First are the substantive nondiscrimination provisions—those conferring substantive rights upon borrowers to be free from discriminatory practices in the lending of money or extending of credit. No dispute presently exists as to those. We are not faced with a suit by a borrower against a federal association charging a violation of a substantive state regulation. If the nonpre-emption intent of the Civil Rights Acts (that the applicant should have the benefit of what, in the judgment of the Federal Reserve Board is the greater protection afforded) is to be given effect, it would apply to those substantive rights. Whether pre-emption exists as to them is a question we need not and do not reach.

Constituting a second group are the procedural aspects of the Act and the federal regulations—those providing for regulatory control over the lending institutions to insure that the substantive rights of borrowers are respected. These include regulations providing for monitoring, for enforcement and complaint resolution mechanism and for notice. It is the regulatory authority of appellant over the federal associations in these respects that is here in dispute.

In our judgment the regulatory control of the Bank Board over federal savings and loan associations is so pervasive as to leave no room for state regulatory control. As this court noted in *Meyers v. Beverly Hills*

Federal Savings & Loan Ass'n., 499 F.2d 1145, 1147 (9th Cir. 1974):

> "Pursuant to its valid statutory authority, the Federal Home Loan Bank Board has promulgated comprehensive regulations covering all aspects of every federal savings and loan association 'from its cradle to its corporate grave.' People of State of California v. Coast Federal Savings and Loan Ass'n., S.D.Ca. 1951, 98 F.Supp. 311, 316."

The broad regulatory authority over the federal associations conferred upon the Bank Board by HOLA does wholly pre-empt the field of regulatory control over these associations. If state-conferred rights are to be enforced against the federal associations by any regulatory body (a question we do not reach), enforcement must be by the Bank Board.

Judgment affirmed.

Statement of Intended Decision.

In the United States District Court, for the Eastern District of California.

Conference of Federal Savings and Loan Associations, etc., et al., Plaintiffs, v. Richard T. Silberman, etc., et al., Defendants.

Federal Home Loan Bank Board, Cross-Claimant, v. Richard T. Silberman, etc., Cross-Defendant. Civ. No. S-78-55 PCW.

This matter came on regularly for hearing May 1, 1978 for:

(1) the motions of defendant Richard T. Silberman, California Secretary of Business and Transportantion to dismiss the complaint and cross-complaint or, in the alternative, to stay proceedings in the action, and to strike certain language and appendices from the complaint;

(2) the motion of defendant Federal Home Loan Bank Board seeking to enjoin further state proceedings to enforce the California Housing Financial Discrimination Act of 1977 as against federally chartered savings and loans, and, more particularly, the proceedings in *Silberman v. West Coast Federal*, No. 220012, Superior Court of California, San Mateo, an enforcement action instituted *subsequent* to plaintiff's filing of the instant suit for declaratory relief in this Court; and

(3) the motion of plaintiff Conference of Federal Savings and Loan Associations for partial summary judgment on the question of federal preemption in the area of the regulation of red-lining practices of federally chartered savings and loans and request for entry of final judgment pursuant to FRCP 54(b).

The Court, having considered the copious points and authorities and oral arguments of counsel, makes this statement of intended decision.

I. The Court is of the opinion that subject matter jurisdiction over the complaint exists under 28 U.S.C. §1331 and 28 U.S.C. §1337. A bona fide controversy arose between plaintiffs, Conference and individual Savings and Loan Associations, and defendants, Federal Home Loan Bank Board and California Secretary of Business and Transportation, when plaintiffs received conflicting directives regarding anti-redlining notices from the respective defendants. That controversy arises under the Home Owners' Loan Act of 1933, 12 U.S.C. §1461 *et seq.* (an Act of Congress regulating Commerce within the meaning of 28 U.S.C. §1337), and exists independent of the subsequently filed state enforcement action now pending in the San Mateo Superior Court. Because subject matter jurisdiction exists in this Court independent of the state proceedings, and any defense thereto, the *Wycoff* rule will not oust this Court of jurisdiction.

II. The Court is of the opinion that subject matter jurisdiction over the Federal Home Loan Bank Board's cross-complaint exists both by way of ancillary jurisdiction and by way of independent jurisdiction under 28 U.S.C. §1331, 28 U.S.C. §1337, and 28 U.S.C. §1345. As stated above, the Home Owners' Loan Act of 1933 is an Act of Congress regulating Commerce within the meaning of 28 U.S.C. §1337. Further, in the opinion of this Court, Section 5(d)(1) of that Act, 12 U.S.C. §1464(d) (1), which grants the Federal Home Loan Bank Board the "power to enforce this section and the rules and regulations hereunder", expressly authorizes the Federal Home Loan Bank Board,

as an agency of the United States, to bring suit to protect its regulatory power under that statute within the meaning of 28 U.S.C. §1345.

III. The Court declines, in its discretion, to stay this action pending resolution of the same or similar issues in other forums.

IV. Defendant Silberman's motion to strike certain language and appendices from the complaint will also be denied:

(a) The Conference of Federal Savings and Loan Associations is a proper party plaintiff.

(b) The Court is capable of disregarding any surplusage created by the incorporation of Exhibits "A" and "B" to the plaintiffs' complaint.

(c) The Court is of the opinion that no "scandalous" or "impertinent" characterizations of Secretary Silberman's conduct have been made.

(d) The Federal Home Loan Bank Board's cross-claim is properly before this Court. The Board is a proper party defendant and need not be "realigned". The fact that plaintiffs would prefer to comply with the Federal Home Loan Bank Board's directives over those of Secretary Silberman in no way denigrates from the actual controversy created by the conflicting assertions of regulatory authority by the two defendants.

V. Plaintiff's motion for partial summary judgment on the red-lining practices preemption question will also be granted. It is the opinion of this Court that the Federal Home Loan Bank Board's exercise of its plenary regulatory power, granted by Congress under the Home Owners' Loan Act of 1933, "to provide for the organization, incorporation, examination, opera-

tion and regulation of associations . . .", preempts legislation by the State of California which attempts to subject federally chartered savings and loans to state regulation and discipline in the area of anti-redlining practices. *Meyers v. Beverly Hills Federal Savings & Loan Ass'n.*, 499 F.2d 1145 (9th Cir. 1974). Language contained in the Equal Credit Opportunity Act, 15 U.S.C. §1691 *et seq.*, and in the Home Mortgage Disclosure Act of 1975, 12 U.S.C. §§2801-2809, in no way limits the Federal Home Loan Bank Board's plenary regulatory power under the Home Owners' Loan Act of 1933, 12 U.S.C. §1461 *et seq.*

VI. Plaintiffs' request for entry of final judgment as to this issue under FRCP 54(b) will also be granted that the parties may seek immediate appeal of this ruling should they so desire. There is no just reason for delay.

VII. While the Court is of the opinion that the Federal Home Loan Bank Board's motion seeking to enjoin further state enforcement proceedings, based on the provisions of the California Housing Financial Disclosure Act of 1977, as against federally chartered savings and loans could also be granted under the authority of *NLRB v. Nash-Finch*, 404 U.S. 138, 144 (1971) and its progeny, such an order would appear to be unnecessary in the light of this Court's ruling on plaintiff's motion for partial summary judgment and certification of that question for immediate appeal. However, should circumstances arise where such an injunction might be necessary in aid of this Court's jurisdiction or to protect and effectuate its judgments, See 28 U.S.C. §2283, the Court would entertain a renewal of the motion.

Counsel for either of the prevailing parties, the Federal Home Loan Bank Board or Conference of Federal Savings and Loan Associations, is directed to prepare proposed findings of fact and conclusions of law and a proposed order for submission to the Court pursuant to Local Rule 121.

DATED: May 9, 1978.

/s/Philip C. Wilkins
UNITED STATES DISTRICT JUDGE

Findings of Fact and Conclusions of Law.

United States District Court, Eastern District of California.

Conference of Federal Savings and Loan Associations, a California corporation; and Alameda Federal Savings and Loan Association; Bay View Federal Savings and Loan Association; California Federal Savings and Loan Association; Coast Federal Savings and Loan Association; Eureka Federal Savings and Loan Association; First Federal Savings and Loan Association of San Diego; First Federal Savings and Loan Association of Santa Monica; First Federal Savings and Loan Association of South Pasadena; Home Federal Savings and Loan Association of San Diego; Orange Belt Federal Savings and Loan Association; Pacific Federal Savings and Loan Association; Peoples Federal Savings and Loan Association; Pomona First Federal Savings and Loan Association; Provident Federal Savings and Loan Association of Riverside; Redlands Federal Savings and Loan Association; Republic Federal Savings and Loan Association; San Francisco Federal Savings and Loan Association; Santa Fe Federal Savings and Loan Association; the Heart Federal Savings and Loan Association; and Western Federal Savings and Loan Association, each of which is an association organized and operating as an instrumentality of the United States of America pursuant to Section 5(a) of the Home Owners' Loan Act of 1933, as amended [12 U.S.C. 1464(a)], Plaintiffs, vs. Richard T. Silberman, as Secretary of the Business and Transportation Agency of the State of California; and The Federal Home Loan Bank Board, Defendants.

Federal Home Loan Bank Board, Cross-Claimant, vs. Richard T. Silberman, as Secretary of the Business

and Transportations Agency of the State of California, Cross-Defendant. Civil No. S 78-55-PCW.

On May 1, 1978, hearings were held before the Honorable Philip C. Wilkins, Judge of the United States District Court for the Eastern District of California, on various Motions of the parties to the above entitled action and cross-action, namely:

A. The following Motions by plaintiffs:

1. Motion For Partial Summary Judgment on Behalf of Plaintiffs, [F.R.C.P. Rule 56], dated March 3, 1978;

2. Motion For Entry of Final Judgment, [F.R.C.P. Rule 54(b)], dated March 3, 1978.

B. The following Motions by defendant Richard T. Silberman:

1. Motions To Dismiss, Or In The Alternative, To Stay Action, dated March 13, 1978 and April 10, 1978;

2. Motion To Strike, dated March 13, 1978.

C. The Motion For Preliminary Injunction, dated March 17, 1978, by defendant Federal Home Loan Bank Board.

William F. McKenna, Esq. and Terry O. Kelly, Esq., of the law firm of McKenna & Fitting, appeared at such hearings on behalf of plaintiffs; W. Gary Kurtz, Esq. and Joseph M. O'Heron, Esq., Deputy Attorneys General of the Office of the Attorney General of the State of California, appeared thereat on behalf of the defendant and cross-defendant Richard T. Silberman, as Secretary of the Business and Transportation Agency of the State of California; and Harvey Simon, Esq., Assistant General Counsel of the Federal Home Loan Bank Board, appeared thereat on behalf of the

defendant and cross-claimant Federal Home Loan Bank Board.

As said hearings this Court heard oral argument by counsel and thereafter, and at the conclusion of said hearings, took the matters of such Motions under submission.

On May 9, 1978, this Court issued its written Statement of Intended Decision in which this Court granted the aforementioned Motions of plaintiffs and denied the aforementioned respective Motions of defendant and cross-defendant Richard T. Silberman and defendant and cross-claimant Federal Home Loan Bank Board.

In accordance with such Statement of Intended Decision and otherwise being fully advised in the premises, this Court now and hereby makes its Findings of Fact and Conclusions of Law in the premises as follows:

FINDINGS OF FACT

1. For purposes of these Findings of Fact and the following Conclusions of Law based thereon:

(a) "Conference" shall mean plaintiff Conference of Federal Savings and Loan Associations;

(b) "Plaintiff Federal associations" shall mean those Federal savings and loan associations hereinabove named as plaintiffs and those other Federal association members of the Conference which have their principal offices and operations within California and which are not hereinabove named as plaintiffs;

(c) "Secretary" shall mean the Secretary of the Business and Transportation Agency of California, who at the time of commencement of this action was defendant and cross-defendant Richard T. Silberman;

(d) "Bank Board" shall mean defendant and cross-claimant Federal Home Loan Bank Board;

(e) "HOLA" shall mean the Home Owners' Loan Act of 1933 as amended (12 U.S.C.A. 1461 et seq.);

(f) "The California anti-redlining statutes" shall mean Sections 35,800 through 35,833 of the California Health and Safety Code, also known and cited within California as "The Housing Financial Discrimination Act of 1977" (Chapter 1140, California Statutes of 1977).

2. The Conference sues defendants herein on behalf of itself as a trade association and for the benefit of its Federal association members having their principal offices and operations in California.

3. At all times relevant hereto, each of the plaintiff Federal associations was, and now is, (i) a Federally-chartered savings and loan association organized and existing under and pursuant to HOLA and the various regulations promulgated thereunder, and (ii) subject to the continuing supervision and directives of the Bank Board.

4. At all times relevant hereto, the Secretary had, and now has, (i) control and supervision of the California Department of Savings and Loans and of the formation and operation of California state-chartered savings and loan associations, and (ii) is charged with the responsibility for enforcing the California anti-redlining statutes.

5. At all times relevant hereto, the Bank Board was, and now is, (i) a Federal agency and instrumentality, and (ii) under Federal law, and specifically HOLA, exercising plenary supervisory and regulatory authority over the operation of Federally-chartered savings and loan associations.

6. The California anti-redlining statutes purport to regulate the non-discrimination in lending practices of both Federally-chartered and state-chartered savings and loan associations within California. Such statutes became effective on Janury 1, 1978.

7. In or about mid-December, 1977, the Secretary asserted to the plaintiff Federal associations, in writing, that they were required, from and after January 1, 1978, to comply with the provisions of the California anti-redlining statutes, including the posting at all their offices and the giving to all of their loan applicants of a certain "State of California Fair Lending Notice" (Exhibit "C" to the Complaint herein).

8. On or about February 2, 1978 the Bank Board issued its written Opinion that the California anti-redlining statutes are inapplicable to Federal savings and loan associations in California and that such Federal associations are not required to post or give such State of California Fair Lending Notices (Exhibit "B" to the Complaint herein).

9. On February 6, 1978, the plaintiffs commenced the within action for declaratory and injunctive relief.

10. On February 28, 1978, the Secretary commenced Civil Action No. 220012 (entitled "*People of the State of California; and Richard T. Silberman, etc. vs. West Coast Federal Savings and Loan Association, et al.*") in the Superior Court of the State of

California for the County of San Mateo against West Coast Federal Savings and Loan Association, a member of the Conference, to obtain declaratory and injunctive relief and civil penalties against West Coast Federal Savings and Loan Association for its alleged non-compliance with the California anti-redlining statutes.

11. A continuing, actual and bona fide controversy exists between the plaintiffs, the Secretary and the Bank Board concerning whether the Secretary has the power and authority to supervise and regulate, and to enforce supervision and regulation, of the non-discrimination in lending practices of the plaintiff Federal associations and further concerning whether the plaintiff Federal associations must comply with the California anti-redlining statutes and the promulgations of the Secretary made pursuant thereto.

12. An immediate declaration of the plaintiff Federal associations' respective rights and duties in the premises of the conflicting claims and contentions of law and of regulatory and supervisory authority being made by and between the Secretary and the Bank Board in respect to the non-discrimination in lending practices of plaintiff Federal associations is required in order to prevent substantial and continuing burden and uncertainty to the plaintiff Federal associations in the conduct of their respective businesses and, further to prevent interference with the Bank's Board regulation of non-discrimination in lending practices of the plaintiff Federal Association. There is no just reason for delay in entry, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, of a final declaratory judgment concerning the controversy described in Finding of Fact No. 11.

13. Any finding of fact herein which is actually a conclusion of law shall be deemed to be a conclusion of law.

CONCLUSIONS OF LAW

1. The controversy described in Finding of Fact No. 11 is one arising under HOLA. HOLA is an Act of Congress regulating commerce within the meaning of 28 U.S.C. §1337.

2. This Court has subject matter jurisdiction over the Complaint herein under 28 U.S.C. §3131 and 28 U.S.C. §1337.

3. This Court has both ancillary and independent jurisdiction over the Cross-claim herein under 28 U.S.C. §1331, 28 U.S.C. §1337 and 28 U.S.C. §1345. The Bank Board is authorized to prosecute its Cross-claim herein under Section 5(d)(1) of HOLA.

4. The Conference is a proper party plaintiff to this action and has standing to bring and prosecute this action on behalf of itself and for the benefit of its Federal association members having their principal offices and operations in California.

5. The plaintiffs are entitled to a declaratory judgment against the Secretary in respect to the controversy described in Finding of Fact No. 11.

6. The Bank Board's exercise of its plenary regulatory power granted by Congress under HOLA preempts legislation by the State of California which attempts to subject Federal savings and loan associations in California to state regulation and discipline in the area of anti-redlining practices. Such plenary regulatory power of the Bank Board is not limited by provisions of either the Equal Credit Opportunity Act (15 U.S.C. §1691 *et seq.*) or the Home Mortgage Disclosure Act of 1975 (12 U.S.C. §§2801-2809).

7. The Secretary has no power or authority to require or enforce compliance by the plaintiff Federal associations with the California anti-redlining statutes.

8. The plaintiff Federal associations are not required to post or give the State of California Fair Lending Notice attached as a part of Exhibit "C" to the Complaint herein.

9. In light of this Court's granting partial summary judgment to the plaintiffs in respect to the controversy described in Finding of Fact No. 11 and this Court's directing entry of a final judgment thereon pursuant to Rule 54(b), Federal Rules of Civil Procedure, the preliminary injunction requested by the Bank Board is unnecessary. However, this Court had, continues to have and hereby retains the equitable jurisdiction to grant such an injunction under the authority of *NLRB v. Nash-Finch*, 404 U.S. 138, 144 (1971). Such retention of equitable jurisdiction shall be in addition to the jurisdiction which the Court retains by operation of the law under 28 U.S.C. §2283.

10. Any conclusion of law herein which is actually a finding of fact shall be deemed to be a finding of fact.

11. Let final judgment in favor of the plaintiffs and against the Secretary be entered in accordance herewith and pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

DATED: August 16, 1978.

UNITED STATES DISTRICT JUDGE

United States Constitution, Article 6, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

California Housing Financial Discrimination Act of 1977 (Cal. Health & Safety Code § 35800-35854).

CHAPTER 1. FINDINGS AND DECLARATIONS OF PURPOSE AND POLICY.

§35800. Short title

This part shall be known and may be cited as The Housing Financial Discrimination Act of 1977.

§ 35801. Legislative findings and declarations

The Legislature finds and declares:

(a) The subject of housing is of vital statewide importance to the health, safety, and welfare of the residents of the state.

(b) A healthy housing market, where residents of this state have a choice of housing opportunities and where the housing consumer may effectually choose within a free market place, is necessary to achieve a healthy state economy.

(c) The equities that California residents accumulate in family homes must be protected and conserved.

(d) The Legislature has the responsibility to direct the discontinuance of injurious practices.

(e) With respect to certain geographic areas, financial institutions have sometimes denied financial assistance or approved assistance on terms less favorable than are usually offered in other geographic areas, regardless of the creditworthiness of the applicant or the condition of the real-property security offered, and this practice has the following effects:

(1) Contributes to the decline of available family housing in such areas and is likely to continue to do so.

(2) Limits the choice of housing opportunities and inhibits the operation of a healthy housing market in such areas.

(3) Leads to the abandonment of such areas.

(4) Adversely affects the health, welfare, and safety of the residents of this state.

(5) Undermines the value of the equity of current owners of property in such areas.

(6) Inhibits the granting of amortized loans.

(7) Perpetuates racially and economically segregated neighborhoods and geographic areas.

(f) The practice of denying mortgage loans or adversely varying the terms of such loans because of conditions, characteristics, or trends in a neighborhood or geographic area that are unrelated to the creditworthiness of the applicant or the value of the real property security offered is against public policy.

§ 35802. Purposes of Part

The purposes of this part include the following:

(a) To prevent discrimination in the provision of financial assistance for financing or refinancing the purchase, construction, rehabilitation, or improvement of housing accommodations because of conditions, characteristics, or trends in the neighborhood or geographic area surrounding the security property.

(b) To encourage increased lending in neighborhoods or geographic areas in which conventional residential mortgage financing has been unavailable.

(c) To increase the availability of housing accommodations to creditworthy persons.

(d) To ensure the supply of decent, safe housing.

(e) To prevent the abandonment and decay of neighborhoods and geographic areas.

§35803 Police power

This part shall be deemed an exercise of the police power of the state for the protection of the health, welfare, and peace of the people of this state.

CHAPTER 2. DEFINITIONS.

§35805. Definitions

As used in this part:

(a) "Agency" means the Business and Transportation Agency.

(b) "Fair market value" means the highest price which a property will bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, acting prudently and knowledgeably.

(c) "Financial institution" includes any bank, savings and loan association, or other institution in this state, including a public agency, that regularly makes, arranges, or purchases loans for the purchase, construction, rehabilitation, improvement, or refinancing of housing accommodations.

(d) "Housing accommodation" includes any improved or unimproved real property, or portion thereof, that (1) is used or is intended to be used as a residence, and (2) is or will be occupied by the owner, and (3) contains not more than four dwelling units. "Housing accommodation" shall also include any residential dwelling containing not more than four dwelling units where the owner thereof, whether or not the owner will occupy the property, applies or has applied for a secured home improvement loan from a financial institution, the proceeds of which loan will be used to improve the security property.

(e) "Secretary" means the Secretary of the Business and Transportation Agency.

CHAPTER 3. PROHIBITIONS AND ENFORCEMENT

§ 35810. Neighborhood or geographic area

No financial institution shall discriminate in the availability of, or in the provision of, financial assistance for the purpose of purchasing, constructing, rehabilitating, improving, or refinancing housing accommodations due, in whole or in part, to the geographic area surrounding the housing accommodation, unless the financial institution can demonstrate that such consideration in the particular case is required to avoid an unsafe and unsound business practice.

§ 35811. Race, color, religion, sex, marital status, national origin or ancestry

No financial institution shall discriminate in the availability of, or in the provision of, financial assistance for the purpose of purchasing, constructing, rehabilitating, improving or refinancing housing accommodations due, in whole or in part, to the consideration of race, color, religion, sex, marital status, national origin, or ancestry.

§ 35812. Neighborhood or geographic area; racial, ethnic, religious or national origin composition

No financial institution shall consider the racial, ethnic, religious, or national origin composition of a neighborhood or geographic area surrounding a housing accommodation or whether or not such composition is undergoing change, or is expected to undergo change, in appraising a housing accommodation or in determining whether or not, and under what terms and conditions, to provide financial assistance for the purpose of purchasing, constructing, rehabilitating, improving, or refinancing a housing accommodation. No financial institution shall utilize appraisal practices that are inconsistent with the provisions of this part.

§ 35813. Health or safety of occupancy; fair market value of property

Nothing in this part shall (1) require a financial institution to provide financial assistance if it is clearly evident that occupancy of the housing accommodation would create an imminent threat to the health or safety of the occupant, or (2) be construed to preclude a financial institution from considering the fair market value of the property which will secure the proposed loan.

§ 35814. Rules and regulation; guidelines and orders; delegation of responsibilities

The secretary shall issue such rules, regulations, guidelines, and orders as are necessary to interpret and enforce the provisions of this part and to affirmatively further the provisions of this part. The secretary may delegate the responsibilities imposed by this section to one or more departments within the agency that license persons or organizations engaged in a business related to, or affecting compliance with, this part.

§ 35815. Lending patterns and practices; compliance with Part; monitoring and investigation; actions on violations; remedies

The secretary or the secretary's designee shall monitor and investigate the lending patterns and practices of financial institutions for compliance with this part, including the lending patterns and practices for housing accommodations which are not occupied by the owner. If a finding is made that such patterns or practices violate the provisions of this part the secretary or

the secretary's designee shall take such action as will effectuate the purposes of this part. In addition to other remedies provided by this part or other provisions of law, the secretary may recommend to the State Treasurer that state funds not be deposited in a financial institution where the secretary has made a finding that such financial institution has engaged in a lending pattern and practice which violates the provisions of this part.

CHAPTER 4. COMPLAINT RESOLUTION

§ 35820. Filing of complaint

Any applicant for a real estate loan in connection with a housing accommodation claimed to be aggrieved by an alleged violation of Chapter 3 (commencing with Section 35810) of this part, or any rule or regulation adopted thereunder, may file a complaint with the secretary.

§ 35821. Conference; conciliation; persuasion

Immediately upon receipt of the complaint, the secretary shall endeavor to eliminate any alleged unlawful practice by conference, conciliation, or persuasion.

§ 35822. Decisions; findings; service; order to cease and desist; financial assistance or damages; report of compliance

If, in accordance with procedures established for the resolution of complaints by the secretary, and within 30 days of receiving the complaint, the secretary finds that a financial institution has engaged in any unlawful practice as defined in this part, the secretary shall state in a written decision his or her findings of fact and shall cause such financial institution to be served with a copy of the decision and an order issued by the secretary requiring it to cease and desist from

such practice and to take one of the following steps as, in the judgment of the secretary, will effectuate the purposes of this part:

(a) The making of the financial assistance or the making of the financial assistance on nondiscriminatory terms; or

(b) The payment of damages to the complainant in an amount not to exceed one thousand dollars ($1,000), if the secretary finds that effective relief under subdivision (a) is no longer available.

The secretary may require a report of the manner of compliance.

If the secretary finds that a financial institution has not engaged in any practice which constitutes a violation of this part, the secretary shall issue a written decision incorporating his findings of fact and shall cause to be served upon the complainant and the financial institution involved a copy of the decision.

§ 35823. Finality of decisions; administrative hearings; representation of complainant; judicial review; costs and attorney fees

The decision of the secretary shall be final unless, within ten days from the date of receipt thereof, the complainant or financial institution files a written request with the secretary for a formal administrative hearing. Upon receipt of such a written request, the secretary shall file a copy thereof with the Office of Administrative Hearings. Within 20 days of receipt of the copy of such request, the Office of Administrative Hearings shall commence a hearing on the merits pursuant to the provisions of the Administrative Procedure Act, Chapter 5 (commencing with Section 11500), Part 1, Division 3, Title 2 of the Government Code,

except that the decision of the hearing officer shall be a final decision and binding upon the secretary. The decision shall be in accordance with the provisions of Section 35822 and shall be rendered within 45 days of receipt of a copy of the request for a hearing by the Office of Administrative Hearings. The secretary shall represent the complainant at such hearing if the secretary's decision rendered pursuant to Section 35822 was in favor of the complainant.

Judicial review may be obtained by the complainant or the financial institution by filing a petition for writ of mandate in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure. In any such judicial proceeding, the court may exercise its independent judgment on the evidence included in the record of the administrative hearing and may additionally consider evidence which was improperly excluded by the hearing officer and any other relevant evidence not included in the record of the administrative hearing which the court finds the offering party could not, in the exercise of reasonable diligence, have produced at the administrative hearing. The court may in its discretion award costs or reasonable attorney fees, or both, to the complainant if the complainant is the prevailing party, without regard to whether such judicial action is brought by the complainant or by the financial institution.

CHAPTER 5. MISCELLANEOUS

§ 35830. Notice to applicants of rights; contents; posting

In order to further the purposes of this part, financial institutions shall notify all applicants at the time of written application for financial assistance of the prohibitions enumerated in Chapter 3 (commencing

with Section 35810) and of the right of review provided by Section 35820. Such notice shall include the address of the secretary, or the secretary's designee, and where complaints may be filed and questions may be asked. Such notice shall be in at least 10-point type and shall also be posted in a conspicuous place for public inspection.

§ 35831. Law governing; rules and regulations; guidelines and orders

The provisions of this part, including rules, regulations, guidelines, and orders issued pursuant to this part, shall not affect the validity of any prohibitions or requirements pertaining to the activity of financial institutions that arise from other provisions of law relating to discrimination in lending. Rules, regulations, guidelines, and orders issued pursuant to this part shall not be in any manner contrary to, or inconsistent with, the purpose of this part.

§ 35832. Liberal construction

The provisions of this part shall be liberally construed in order to effectuate the purposes of this part.

§ 35833. Severability

If any clause, sentence, paragraph, or part of this part or application thereof to any person, financial institution, or circumstance shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this part and the application thereof to other persons, financial institutions or circumstances but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person, financial institution. or circumstance involved.

§ 35854. Inoperative

42 U.S.C. §§ 3610, 3615 (Fair Housing Provisions of the Civil Rights Act of 1968 or "Title VIII")

§ 3610 Enforcement.

(a) Person aggrieved; complaint; copy; investigation; informal proceedings; violations of secrecy; penalties.

Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter "person aggrieved") may file a complaint with the Secretary. Complaints shall be in writing and shall contain such information and be in such form as the Secretary requires. Upon receipt of such a complaint the Secretary shall furnish a copy of the same to the person or persons who allegedly committed or are about to commit the alleged discriminatory housing practice. Within thirty days after receiving a complaint, or within thirty days after the expiration of any period of reference under subsection (c) of this section, the Secretary shall investigate the complaint and give notice in writing to the person aggrieved whether he intends to resolve it. If the Secretary decides to resolve the complaint, he shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion. Nothing said or done in the course of such informal endeavors may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned. Any employee of the Secretary who shall make public any information in violation of this provision shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

(b) Complaint; limitations; answer; amendments; verification.

A complaint under subsection (a) of this section shall be filed within one hundred and eighty days after the alleged discriminatory housing practice occurred. Complaints shall be in writing and shall state the facts upon which the allegations of a discriminatory housing practice are based. Complaints may be reasonably and fairly amended at any time. A respondent may file an answer to the complaint against him and with the leave of the Secretary, which shall be granted whenever it would be reasonable and fair to do so, may amend his answer at any time. Both complaints and answers shall be verified.

(c) Notification of State or local agency of violation of State or local fair housing law; commencement of State or local law enforcement proceedings; certification of circumstances requisite for action by Secretary.

Wherever a State of local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this subchapter, the Secretary shall notify the appropriate State or local agency of any complaint filed under this subchapter which appears to constitute a violation of such State or local fair housing law, and the Secretary shall take no further action with respect to such complaint if the appropriate State or local law enforcement official has, within thirty days from the date the alleged offense has been brought to his attention, commenced proceedings in the matter, or, having done so, carried forward such proceedings with reasonable promptness. In no event shall the Secre-

tary take further action unless he certifies that in his judgment, under the circumstances of the particular case, the protection of the rights of the parties or the interests of justice require such action.

(d) Commencement of civil actions; State or local remedies available; jurisdiction and venue; findings; injunctions; appropriate affirmative orders.

If within thirty days after a complaint is filed with the Secretary or within thirty days after expiration of any period of reference under subsection (c) of this section, the Secretary has been unable to obtain voluntary compliance with this subchapter, the person aggrieved may, within thirty days thereafter, commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this subchapter, insofar as such rights relate to the subject of the complaint: *Provided,* That no such civil action may be brought in any United States district court if the person aggrieved has a judicial remedy under a State or local fair housing law which provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this subchapter. Such actions may be brought without regard to the amount in controversy in any United States district court for the district in which the discriminatory housing practice is alleged to have occurred or be about to occur or in which the respondent resides or transacts business. If the court finds that a discriminatory housing practice has occurred or is about to occur, the court may, subject to the provisions of section 3612 of this title, enjoin the respondent from engaging in such practice or order such affirmative action as may be appropriate.

(e) Burden of proof.

In any proceeding brought pursuant to this section, the burden of proof shall be on the complainant.

(f) Trial of action; termination of voluntary compliance efforts.

Whenever an action filed by an individual, in either Federal or State court, pursuant to this section or section 3612 of this title, shall come to trial the Secretary shall immediately terminate all efforts to obtain voluntary compliance

§ 3615. Effect on State laws.

Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this subchapter shall be effective, that grants, gruarantees, or protects the same rights as are granted by this subchapter; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid. (Pub. L. 90-284, title VIII, § 815, Apr. 11, 1968, 82 Stat. 89.)

15 U.S.C. §§ 1691(e)-(g) (Equal Credit Opportunity Act or "ECOA").

Election of remedies under subchapter or State law; nature of relief determining applicability

(e) Where the same act or omission constitutes a violation of this subchapter and of applicable State law, a person aggrieved by such conduct may bring a legal action to recover monetary damages either under this subchapter or under such State law, but not both. This election of remedies shall not apply to court actions in which the relief sought does not include monetary damages or to administrative actions.

Compliance with inconsistent State laws; determination of inconsistency

(f) This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter, from complying with, the laws of any State with respect to credit discrimination, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. The Board is authorized to determine whether such inconsistencies exist. The Board may not determine that any State law is inconsistent with any provision of this subchapter if the Board determines that such law gives greater protection to the applicant.

Exemption by regulation of credit transactions covered by State law; failure to comply with State law

(g) The Board shall by regulation exempt from the requirements of sections 1691 and 1691a of this title any class of credit transactions within any State

if it determines that under the law of that State that class of transactions is subject to requirements substantially similar to those imposed under this subchapter or that such law gives greater protection to the applicant, and that there is adequate provision for enforcement. Failure to comply with any requirement of such State law in any transaction so exempted shall constitute a violation of this subchapter for the purposes of section 1691e of this title.

12 U.S.C. §§ 1461-1470 (Home Owners' Loan Act of 1933 or "HOLA").

§ 1461. Short title.

This chapter may be cited as the "Home Owners' Loan Act of 1933."

§ 1462. Definitions.

As used in this chapter—

(a) The term "Board" means the Federal Home Loan Bank Board.

(b), (c). Omitted.

(d) The term "association" means a Federal Savings and Loan Association chartered by the Board as provided in section 1464 of this title.

§ 1463. Repealed. Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 648.

§ 1463a. Bonds issued under original provisions; interest and principal.

§ 1463b. Repealed. May 28, 1935, ch. 150, § 17 (b), 49 Stat. 297.

§ 1464. Federal Savings and Loan Associations.

(a) Organization authorized.

In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

(b) Capital; members of the association; voting rights; payment of savings accounts and withdrawals; nontransferable orders or authorizations: authorization to borrow, give security, and issue notes, bonds, debentures, or other obligations.

(1) An association may raise capital in the form of such savings deposits, shares, or other accounts, for fixed, minimum, or indefinite periods of time (all of which are referred to in this section as savings accounts and all of which shall have the same priority upon liquidation) as are authorized by its charter or by regulations of the Board, and may issue such passbooks, time certificates of deposit, or other evidence of savings accounts as are so authorized. Holders of savings accounts and obligors of an association shall, to such extent as may be provided by its charter or by regulations of the Board, be members of the association, and shall have such voting rights and such other rights as are thereby provided. Except as may be otherwise authorized by the association's charter or regulation of the Board in the case of savings accounts for fixed or minimum terms of not less than thirty days, the payment of any savings account shall be subject to the right of the association to require such advance notice, not less than thirty days, as shall be provided for by the charter of the association or the regulations of the Board. The payment of withdrawals from savings accounts in the event an association does not pay all withdrawals in full (subject to the right of the association to require notice) shall be subject to such rules and procedures as may be prescribed by the association's charter or by regulation of the Board, but any association which, except as

authorized in writing by the Board, fails to make full payment of any withdrawal when due shall be deemed to be in an unsafe or unsound condition to transact business within the meaning of subsection (d) of this section. Savings accounts shall not be subject to check or to withdrawal or transfer on negotiable or transferable order or authorization to the association, but the Board may by regulation provide for withdrawal or transfer of savings accounts upon nontransferable order or authorization.

(2) To such extent as the Board may authorize by regulation or advice in writing, an association may borrow, may give security, and may issue such notes, bonds, debentures, or other obligations, or other securities (except capital stock) as the Board may so authorize.

(c) Loans; security required; investment of assets.

Such associations shall lend their funds only on the security of their savings accounts or on the security of first liens upon real property within one hundred miles of their home office or within the State in which such home office is located which constitute first liens upon homes, combinations of homes and business property, other dwelling units, or combinations of dwelling units, including homes, and business property involving only minor or incidental business use (all of which may be defined by the Board); *Provided,* That not more than $45,000 for each single-family dwelling, and not more than such amount per room as the Board may determine by regulation within the limits allowable (at the time of the loan) in section 1713(c)(3) of this title for any other dwelling unit covered by such lien, shall be loaned on the security of any

such lien, and the Board shall by regulation limit to not more than 20 per centum of the assets of the association the aggregate amount or amounts of the investments which may be made by an association under the foregoing provisions of this sentence on the security of property which comprises or includes more than four dwelling units or does not constitute homes or combinations of homes and business property; except that not exceeding 20 per centum of the assets of such association may be loaned on the security of first liens upon improved real estate without regard to the foregoing limitations, and additional sums not exceeding 20 per centum of the assets of an association may be used without regard to such area restriction for the making or purchase of participating interests in first liens on real property of the type described in this sentence in the matter preceding this proviso: *And provided further,* That any portion of the assets of such associations may be invested in obligations of, or fully guaranteed as to principal and interest by, the United States, or in the stock or bonds of a Federal Home Loan Bank, or in obligations, participations, or other instruments of or issued by, or fully guaranteed as to principal and interest by, the Federal National Mortgage Association or the Government National Mortgage Association, or any other agency of the United States, or the stock of the Federal National Mortgage Association; or in time deposits, certificates, or accounts of any bank the deposits of which are insured by the Federal Deposit Insurance Corporation; or in general obligations of any State or of any political subdivision thereof; and as used in this section the term "State" shall include the District of Columbia, the Commonwealth of Puerto

Rico, and the possessions of the United States: *And provided further,* That any such association which is converted from a State-chartered institution may continue to make loans in the territory in which it made loans while operating under State charter. In addition to the loans and investments otherwise authorized, such associations may purchase, subject to all the provisions of this paragraph except the area restriction, loans secured by first liens on improved real estate which are insured under the provisions of the National Housing Act, as amended, or insured as provided in the Servicemen's Readjustment Act of 1944, as amended, or chapter 37 of Title 38. Structures or parts thereof designed or used as fraternity or sorority houses which include sleeping accommodations for students of a college or university, or designed or used principally for the provision of living accommodations for persons who are students, employees, or members of the staff of a college, university, or hospital, shall be considered, subject to such regulations as the Board may prescribe, "other dwelling units" for the purposes of this subsection.

Without regard to any other provision of this subsection except the area requirement, any such association is authorized to invest a sum not in excess of 20 per centum of the assets of such association in loans insured under subchapter I of chapter 13 of this title, in home improvement loans insured under subchapter II of chapter 13 of this title, in unsecured loans insured or guaranteed under the provisions of the Servicemen's Readjustment Act of 1944, as amended, or chapter 37 of Title 38, and in other loans for property alteration, repair, or improvement, including the construction of new structures related to residen-

tial use of the property: *Provided,* That no such loan, unless so insured or guaranteed, shall be made in excess of $5,000. Participating interests in loans secured by mortgages which have the benefit of insurance or guaranty (or a commitment therefor) under the National Housing Act, the Servicemen's Readjustment Act of 1944, or chapter 37 of Title 38 shall not be taken into account in determining the amount of loans which an association may make within any of the percentage limitations contained in the first proviso of this subsection.

Without regard to any other provision of this subsection, but subject to such prohibitions, limitations, and conditions as the Board may by regulation prescribe, any such association may make and invest in—

(A) any loan not exceeding $5,000 made for the repair, equipping, alteration, or improvement of any real property, or

(B) any loan made for the purpose of mobile home financing.

Without regard to any other provision of this subsection, any such association is authorized to invest in loans, obligations, and advances of credit (all of which are hereinafter referred to as "loans") made for the payment of expenses of college, university, or vocational education, but no association shall make any investment in loans under this paragraph if the principal amount of its investment in such loans, exclusive of any investment which is or which at the time of its making was otherwise authorized, would thereupon exceed 5 per centum of its assets.

Without regard to any other provision of this subsection except the area restriction, any such association

whose general reserves, surplus, and undivided profits aggregate a sum in excess of 5 per centum of its withdrawable accounts is authorized to invest an amount not exceeding at any one time 5 per centum of such withdrawable accounts in loans to finance the acquisition and development of land for primarily residential usage, subject to such rules and regulations as the Board may prescribe.

Without regard to any other provision of this subsection except the area restriction and the dollar amount limitation, any such association may invest an amount not exceeding at any one time 5 per centum of its assets in nonamortized loans which are made on the security of first liens upon homes or combinations of homes and business property and which (1) are repayable within a period of eighteen months, (2) provide that interest payments be made at least semiannually, and (3) do not exceed 80 per centum of the appraised value of the property involved. For the purposes of this paragraph the term "first liens" include the assignment of the whole of the beneficial interest in a trust having a corporate trustee whereunder real estate held in the trust can be subjected to the satisfaction of the obligation or obligations secured with the same priority as a first mortgage, a first deed of trust, or a first trust deed in the jurisdiction where the real estate is located.

Without regard to any other provision of this subsection except the area restriction, any such association is authorized to invest an amount not exceeding at any one time 5 per centum of its assets in amortized loans or participating interests therein which are secured by first liens upon improved real estate used to provide

housing facilities for the aging, subject to the following qualifications:

(1) each such loan shall be repayable within a period of 30 years;

(2) no such loan shall exceed 90 per centum of the appraised value of the improved real estate given as security therefor; and

(3) each such loan—

(A) shall be made upon and secured by real estate which is improved by housing accommodations, individual or multiple, designed for the purpose of providing accommodations for occupancy by aging persons, or of providing rest homes or nursing homes, so constructed or altered as to be suitable primarily for the occupancy of persons over fifty-five years of age and limited principally to the occupancy of such persons; and

(B) shall be made for the implementation of the purpose described in clause (A).

Without regard to any other provision of this subsection, any such association is authorized to invest not more than 5 per centum of its assets in, or in interests in, real property located within urban renewal areas as defined in subsection (a) of section 1460 of Title 42 and obligations secured by first liens on real property so located, but no investment shall be made by an association under this sentence in real property or any interest therein if the aggregate investment of the association under this sentence in real property and interests therein, determined as prescribed by the Board, would thereupon exceed 2 per centum of the assets of the association.

Without regard to any other provisions of this subsection, any such association whose general reserves, surplus, and undivided profits aggregate a sum in excess of 5 per centum of its withdrawable accounts is authorized to invest in, to lend to, or to commit itself to lend to any business development credit corporation incorporated in the State in which the head office of such association is situated, in the same manner and to the same extent as the statutes of such State authorize a savings and loan association organized under the laws of said State to invest in, to lend to, or to commit itself to lend to such business development credit corporation, but the aggregate amount of such investments, loans, and commitments of any such association outstanding at any time shall not exceed one-half of 1 percentum of the total outstanding loans made by such association, or $250,000, whichever is the lesser.

For the purpose of this section the terms "real property" and "real estate" shall include a leasehold or subleasehold estate in real property under a lease or sublease the term of which does not expire, or which is renewable automatically or at the option of the holder (or at the option of the association) so as not to expire, for at least ten years beyond the maturity of the debt.

Any such association is authorized to invest in the capital stock, obligations, or other securities of any corporation organized under the laws of the State, District, Commonwealth, territory, or possession in which the home office of the association is located, if the entire capital stock of such corporation is available for purchase only by savings and loan associations of that State, District, Commonwealth, territory, or

possession and by Federal savings and loan associations having their home offices therein, but no association may make any investment under this sentence if its aggregate outstanding investment under this sentence, determined as prescribed by the Board, would thereupon exceed 1 per centum of its assets.

Without regard to any other provision of this subsection, any such association may, to such extent as the Federal Home Loan Bank Board may by regulation permit, (1) invest in loans, and interests in loans, secured by mortgages as to which the association has the benefit of insurance under subchapter IX-A of chapter 13 of this title, now or hereafter in effect, or of a commitment or agreement for such insurance, or (2) acquire and hold investments in housing project loans, or interests therein, having the benefit of any guaranty under section 2181 of Title 22, as now or hereafter in effect, or loans, or interests therein, having the benefit of any guaranty under section 2184 of Title 22, or any commitment or agreement with respect to such loans, or interests therein, made pursuant to either of such sections. This authority extends to the acquisition, holding, and disposition of loans, or interests therein, having the benefit of any guaranty under section 2181 or 2182 of Title 22 or such sections as hereinafter amended or extended, or of any commitment or agreement for any such guaranty. Investments under clause (1) of this paragraph shall not be included in any percentage of assets or other percentage referred to in this subsection. Investments under clause (2) of this paragraph shall not exceed, in the case of any association, 1 per centum of the assets of such association. Without regard to any other provision of this subsection, an association may invest in loans or

obligations, or interests therein, as to which the association has the benefit of any guaranty under title IV of the Housing and Urban Development Act of 1968 or under part B of the Urban Growth and New Community Development Act of 1970, as now or hereafter in effect, or of a commitment or agreement therefor, and such investments shall not be included in any percentage of assets or other percentage referred to in this subsection.

Notwithstanding any other provision of this subsection, an association may invest in loans or obligations, or interests therein, as to which the association has the benefit of insurance under section 1715z-5 of this title, or of a commitment or agreement therefor, and such investments shall not be included in any percentage of assets or other percentage referred to in this subsection.

Any such association may invest in loans, or interests in loans, to financial institutions with respect to which the United States or any agency or instrumentality thereof has any function of examination or supervision, or to any broker or dealer registered with the Securities and Exchange Commission, secured by loans, obligations, or investments in which it has any statutory authority to invest directly.

No building and loan association incorporated under the laws of the District of Columbia or organized in such District or doing business in such District shall establish any branch or move its principal office or any branch without the prior written approval of the Federal Home Loan Bank Board, and no other building and loan association shall establish any branch in such District or move its principal office or any branch in such District without such approval. As used

in the sentence next preceding, "branch" means any office, place of business, or facility, other than the principal office as defined by the Board, of a building and loan association at which accounts are opened or payments thereon are received or withdrawals therefrom are paid, or any other office, place of business, or facility of a building and loan association defined by the Board as a branch within the meaning of such sentence, and as used in such sentence and in this sentence "building and loan association" means any incorporated or unincorporated building, building or loan, building and loan, savings and loan, or homestead association or cooperative bank.

Any such association may invest in any investment which, at the time of the making of the investment, is an asset eligible for inclusion toward the satisfaction of any liquidity requirement imposed on the association pursuant to section 1425a of this title, but only to the extent that the investment is permitted to be so included under regulations issued by the Board pursuant to that section, or is otherwise authorized.

Any such association is authorized to act as trustee of any trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan which qualifies or qualified for specific tax treatment under section 401(d) of Title 26, if the funds of such trust are invested only in savings accounts or deposits in such association or in obligations or securities issued by such association. All funds held in such fiduciary capacity by any such association may be commingled for appropriate purposes of investment, but individual records shall be kept by the fiduciary for each participant and shall show in proper

detail all transactions engaged in under the authority of this paragraph.

Any such association may issue and sell securities which are guaranteed pursuant to section 1721(g) of this title.

Without regard to any other provision of this subsection, any such association is authorized to invest in shares of stock issued by a corporation authorized to be created pursuant to title IX of the Housing and Urban Development Act of 1968, and is authorized to invest in any partnership, limited partnership, or joint venture formed pursuant to section 907(a) or 907(c) of that Act.

(d) Proceedings to enforce compliance with law and regulations; cease and desist proceedings; temporary cease-and-desist orders; suspension or removal of directors or officers; appointment and removal of conservator or receiver; hearings and judicial review; regulations for reorganization, dissolutions, etc.; penalties; definitions; application to other institutions.

(1) The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules and regulations made hereunder, or any other law or regulation, or in any other action, suit, or proceeding to which it is a party or in which it is interested, and in the administration of conservatorships and receiverships, the Board is authorized to act in its own name and through its own attorneys. Except as otherwise provided herein, the Board shall be subject to suit (other than suits on claims for money damages) by any Federal savings and loan association or director

or officer thereof with respect to any matter under this section or any other applicable law, or rules or regulations thereunder, in the United States district court for the judicial district in which the home office of the association is located, or in the United States District Court for the District of Columbia, and the Board may be served with process in the manner prescribed by the Federal Rules of Civil Procedure.

(2)(A) If, in the opinion of the Board, an association is violating or has violated, or the Board has reasonable cause to believe that the association is about to violate, a law, rule, regulation, or charter or other condition imposed in writing by the Board in connection with the granting of any application or other request by the association, or written agreement entered into with the Board, or is engaging or has engaged, or the Board has reasonable cause to believe that the association is about to engage, in an unsafe or unsound practice, the Board may issue and serve upon the association a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the association. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or a later date is set by the Board at the request of the association. Unless the association shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the issuance of the cease-and-desist order. In the event of such consent, or if upon the record made at any

such hearing the Board shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the Board may issue and serve upon the association an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the association and its directors, officers, employees, and agents to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

(B) A cease-and-desist order shall become effective at the expiration of thirty days after service of such order upon the association concerned (except in the case of a cease-and-desist order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable, except to such extent as it is stayed, modified, terminated, or set aside by action of the Board or a reviewing court.

(3)(A) Whenever the Board shall determine that the violation or threatened violation or the unsafe or unsound practice or practices, specified in the notice of charges served upon the association pursuant to paragraph (2)(A) of this subsection, or the continuation thereof, is likely to cause insolvency (as defined in paragraph (6)(A)(i) of this subsection) or substantial dissipation of assets or earnings of the association, or is likely to otherwise seriously prejudice the interests of its savings account holders, the Board may issue a temporary order requiring the association to cease and desist from any such violation or practice. Such order shall become effective upon service upon the association and, unless set aside, limited, or suspended

by a court in proceedings authorized by subparagraph (B) of this paragraph, shall remain effective and enforceable pending the completion of the administrative proceedings pursuant to such notice and until such time as the Board shall dismiss the charges specified in such notice or, if a cease-and-desist order is issued against the association, until the effective date of any such order.

(B) Within ten days after the association concerned has been served with a temporary cease-and-desist order, the association may apply to the United States district court for the judicial district in which the home office of the association is located, or the United States District Court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the association under paragraph (2)(A) of this subsection, and such court shall have jurisdiction to issue such injunction.

(C) In the case of violation or threatened violation of, or failure to obey, a temporary cease-and-desist order, the Board may apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the association is located, for an injunction to enforce such order, and, if the court shall determine that there has been such violation or threatened violation or failure to obey, it shall be the duty of the court to issue such injunction.

(4)(A) Whenever, in the opinion of the Board, any director or officer of an association has committed any violation of law, rule, or regulation, or of a cease-and-desist order which has become final, or has engaged

or participated in any unsafe or unsound practice in connection with the association, or has committed or engaged in any act, omission, or practice which constitutes a breach of his fiduciary duty as such director or officer, and the Board determines that the association has suffered or will probably suffer substantial financial loss or other damage or that the interests of its savings account holders could be seriously prejudiced by reason of such violation or practice or breach of fiduciary duty, and that such violation or practice or breach of fiduciary duty is one involving personal dishonesty on the part of such director or officer, the Board may serve upon such director or officer a written notice of its intention to remove him from office.

(B) Whenever, in the opinion of the Board, any director or officer of an association, by conduct or practice with respect to another savings and loan association or other business institution which resulted in substantial financial loss or other damage, has evidenced his personal dishonesty and unfitness to continue as a director or officer, and, whenever, in the opinion of the Board, any other person participating in the conduct of the affairs of an association, by conduct or practice with respect to such association or other savings and loan association or other business institution which resulted in substantial financial loss or other damage, has evidenced his personal dishonesty and unfitness to participate in the conduct of the affairs of such association, the Board may serve upon such director, officer, or other person a written notice of its intention to remove him from office and/or to prohibit his further participation in any manner in the conduct of the affairs of such association.

(C) In respect to any director or officer of an association or any other person referred to in subparagraph (A) or (B) of this paragraph, the Board may, if it deems it necessary for the protection of the association or the interests of its savings account holders, by written notice to such effect served upon such director, officer, or other person, suspend him from office and/or prohibit him from further participation in any manner in the conduct of the affairs of the association. Such suspension and/or prohibition shall become effective upon service of such notice and, unless stayed by a court in proceedings authorized by subparagraph (E) of this paragraph, shall remain in effect pending the completion of the administrative proceedings pursuant to the notice served under subparagraph (A) or (B) of this paragraph and until such time as the Board shall dismiss the charges in such notice, or, if an order of removal and/or prohibition is issued against the director or officer or other person, until the effective date of any such order. Copies of any such notice shall also be served upon the association of which he is a director or officer or in the conduct of whose affairs he has participated.

(D) A notice of intention to remove a director, officer, or other person from office and/or to prohibit his participation in the conduct of the affairs of an association, shall contain a statement of the facts constituting grounds therefor, and shall fix a time and place at which a hearing will be held thereon. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after the date of service of such notice, unless an earlier or a later date is set by the Board at the request of (i) such director, officer, or other person, and for good cause shown,

or (ii) the Attorney General of the United States. Unless such director, officer, or other person shall appear at the hearing in person or by a duly authorized representative, he shall be deemed to have consented to the issuance of an order of such removal and/or prohibition. In the event of such consent, or if upon the record made at any such hearing the Board shall find that any of the grounds specified in such notice has been established, the Board may issue such orders of suspension or removal from office, and/or prohibition from participation in the conduct of the affairs of the association, as it may deem appropriate. Any such order shall become effective at the expiration of thirty days after service upon such association and the director, officer, or other person concerned (except in the case of an order issued upon consent, which shall become effective at the time specified therein). Such order shall remain effective and enforceable except to such extent as it is stayed, modified, terminated, or set aside by action of the Board or a reviewing court.

(E) Within ten days after any director, officer, or other person has been suspended from office and/or prohibited from participation in the conduct of the affairs of an association under subparagraph (C) of this paragraph, such director, officer, or other person may apply to the United States district court for the judicial district in which the home office of the association is located, or the United States District Court for the District of Columbia, for a stay of such suspension and/or prohibition pending the completion of the administrative proceedings pursuant to the notice served upon such director, officer, or other person under subparagraph (A) or (B) of this paragraph,

and such court shall have jurisdiction to stay such suspension and/or prohibition.

(5)(A) Whenever any director or officer of an association, or other person participating in the conduct of the affairs of such association, is charged in any information, indictment, or complaint authorized by a United States Attorney, with the commission of or participation in a felony involving dishonesty or breach of trust, the Board may by written notice served upon such director, officer, or other person, suspend him from office and/or prohibit him from further participation in any manner in the conduct of the affairs of the association. A copy of such notice shall also be served upon the association. Such suspension and/or prohibition shall remain in effect until such information, indictment, or complaint is finally disposed of or until terminated by the Board. In the event that a judgment of conviction with respect to such offense is entered against such director, officer, or other person, and at such time as such judgment is not subject to further appellate review, the Board may issue and serve upon such director, officer, or other person an order removing him from office and/or prohibiting him from further participation in any manner in the conduct of the affairs of the association except with the consent of the Board. A copy of such order shall be served upon such association, whereupon such director or officer shall cease to be a director or officer of such association. A finding of not guilty or other disposition of the charge shall not preclude the Board from thereafter instituting proceedings to remove such director, officer, or other person from office and/or prohibit further participation in association affairs, pursuant to subparagraph (A) or (B) of paragraph (4) of this subsection.

(B) If at any time, because of the suspension of one or more directors pursuant to this subsection (d), there shall be on the board of directors of an association less than a quorum of directors not so suspended, all powers and functions vested in or exercisable by such board shall vest in and be exercisable by the director or directors on the board and not so suspended, until such time as there shall be a quorum of the board of directors. In the event all of the directors of an association are suspended pursuant to this subsection (d), the Board shall appoint persons to serve temporarily as directors in their place and stead pending the termination of such suspensions, or until such time as those who have been suspended cease to be directors of the association and their respective successors take office.

(6)(A) The grounds for the appointment of a conservator or receiver for an association shall be one or more of the following: (i) insolvency in that the assets of the association are less than its obligations to its creditors and others, including its members; (ii) substantial dissipation of assets or earnings due to any violation or violations of law, rules, or regulations, or to any unsafe or unsound practice or practices; (iii) an unsafe or unsound conditions to transact business; (iv) willful violation of a cease-and-desist order which has become final; (v) concealment of books, papers, records, or assets of the association or refusal to submit books, papers, records, or affairs of the association for inspection to any examiner or to any lawful agent of the Board. The Board shall have exclusive power and jurisdiction to appoint a conservator or receiver. If, in the opinion of the Board, a ground for the appointment of a conservator or receiver as

herein provided exists, the Board is authorized to appoint ex parte and without notice a conservator or receiver for the association. In the event of such appointment, the association may, within thirty days thereafter, bring an action in the United States district court for the judicial district in which the home office of such association is located, or in the United States District Court for the District of Columbia, for an order requiring the Board to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver. Such proceedings shall be given precedence over other cases pending in such courts, and shall be in every way expedited. Upon the commencement of such an action, the court having jurisdiction of any other action or proceeding authorized under this subsection to which the association is a party shall stay such action or proceeding during the pendency of the action for removal of the conservator or receiver.

(B) In addition to the foregoing provisions, the Board may, without any requirement of notice, hearing, or other action, appoint a conservator or receiver for an association in the event that (i) the association, by resolution of its board of directors or of its members, consents to such appointment, or (ii) the association is removed from membership in any Federal home loan bank, or its status as an institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation is terminated.

(C) Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the

exercise of powers or functions of a conservator or receiver.

(D) A conservator shall have all the powers of the members, the directors, and the officers of the association and shall be authorized to operate the association in its own name or to conserve its assets in the manner and to the extent authorized by the Board. The Board shall appoint only the Federal Savings and Loan Insurance Corporation as receiver for an association, and said Corporation shall have power to buy at its own sale as receiver, subject to approval by the Board. The Board may, without any requirement of notice, hearing, or other action, replace a conservator with another conservator or with a receiver, but any such replacement shall not affect any right which the association may have to obtain judicial review of the original appointment, except that any removal under this paragraph (6) shall be removal of the conservator or receiver in office at the time of such removal.

(7)(A) Any hearing provided for in this subsection (d) shall be held in the Federal judicial district or in the territory in which the home office of the association is located unless the party afforded the hearing consents to another place, and shall be conducted in accordance with the provisions of chapter 5 of Title 5. Such hearing shall be private, unless the Board, in its discretion, after fully considering the views of the party afforded the hearing, determines that a public hearing is necessary to protect the public interest. After such hearing, and within ninety days after the Board has notified the parties that the case has been submitted to it for final decision, the Board shall render its decision (which shall include findings of fact upon which its decision is predicated) and shall issue and

cause to be served upon each party to the proceeding an order or orders consistent with the provisions of this subsection. Judicial review of any such order shall be exclusively as provided in this paragraph (7). Unless a petition for review is timely filed in a court of appeals of the United States, as hereinafter provided in subparagraph (B) of this paragraph, and thereafter until the record in the proceeding has been filed as so provided, the Board may at any time, upon such notice and in such manner as it shall deem proper, modify, terminate, or set aside any such order. Upon such filing of the record, the Board may modify, terminate, or set aside any such order with permission of the court.

(B) Any party to the proceeding, or any person required by an order issued under this subsection to cease and desist from any of the violations or practices stated therein, may obtain a review of any order served pursuant to subparagraph (A) of this paragraph (other than an order issued with the consent of the association or the director or officer or other person concerned, or an order issued under paragraph (5)(A) of this subsection), by filing in the court of appeals of the United States for the circuit in which the home office of the association is located, or in the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the date of service of such order, a written petition praying that the order of the Board be modified, terminated, or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the Board shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon the filing of such petition, such

court shall have jurisdiction, which upon the filing of the record shall except as provided in the last sentence of said paragraph (A) be exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the Board. Review of such proceedings shall be had as provided in chapter 7 of Title 5. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court, upon certiorari as provided in section 1254 of Title 28.

(C) The commencement of proceedings for judicial review under subparagraph (B) of this paragraph shall not, unless specifically ordered by the court, operate as a stay of any order issued by the Board.

(8) The Board may in its discretion apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the association is located, for the enforcement of any effective and outstanding notice or order issued by the Board under this subsection (d), and such courts shall have jurisdiction and power to order and require compliance therewith, but except as otherwise provided in this subsection no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this subsection, or to review, modify, suspend, terminate, or set aside any such notice or order. Any court having jurisdiction of any proceeding instituted under this subsection by an association or a director or officer thereof, may allow to any such party such reasonable expenses and attorneys' fees as it deems just and proper; and such expenses and fees shall be paid by the association or from its assets.

(9) In the course of or in connection with any proceeding under this subsection, the Board or any member thereof or a designated representative of the Board, including any person designated to conduct any hearing under this subsection, shall have power to administer oaths and affirmations, to take or cause to be taken depositions, and to issue, revoke, quash, or modify subpenas and subpenas duces tecum; and the Board is empowered to make rules and regulations with respect to any such proceedings. The attendance of witnesses and the production of documents provided for in this paragraph may be required from any place in any State or in any territory at any designated place where such proceeding is being conducted. Any party to proceedings under this subsection may apply to the United States District Court for the District of Columbia, or the United States district court for the judicial district or the United States court in any territory in which such proceeding is being conducted or where the witness resides or carries on business, for enforcement of any subpena or subpena duces tecum issued pursuant to this paragraph, and such courts shall have jurisdiction and power to order and require compliance therewith. Witnesses subpenaed under this paragraph shall be paid the same fees and mileage that are paid witnesses in the district courts of the United States. All expenses of the Board or of the Federal Savings and Loan Insurance Corporation in connection with this subsection shall be considered as nonadministrative expenses.

(10) Any service required or authorized to be made by the Board under this subsection may be made by registered mail, or in such other manner reasonably calculated to give actual notice as the Board may by regulation or otherwise provide.

(11) The Board shall have power to make rules and regulations for the reorganization, consolidation, liquidation, and dissolution of associations, for the merger of associations with other institutions the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, for associations in conservatorship and receivership, and for the conduct of conservatorships and receiverships; and the Board may, by regulation or otherwise, provide for the exercise of functions by members, directors, or officers of an association during conservatorship and receivership.

(12)(A) Any director or officer, or former director or officer, of an association, or any other person, against whom there is outstanding and effective any notice or order (which is an order which has become final) served upon such director, officer, or other person under paragraph (4)(C), (4)(D), or (5)(A) of this subsection, and who (i) participates in any manner in the conduct of the affairs of such association, or directly or indirectly solicits or procures, or transfers or attempts to transfer, or votes or attempts to vote any proxies, consents, or authorizations in respect of any voting rights in such association, or (ii) without the prior written approval of the Board, votes for a director or serves or acts as a director, officer, or employee of any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, shall upon conviction be fined not more than $5,000 or imprisoned for not more than one year, or both.

(B) Except with the prior written consent of the Board, no person shall serve as a director, officer, or employee of an association who has been convicted, or who is hereafter convicted, of a criminal offense

involving dishonesty or a breach of trust. For each willful violation of this prohibition, the association involved shall be subject to a penalty of not more than $100 for each day this prohibition is violated, which the Board may recover by suit or otherwise for its own use.

(C) Whenever a conservator or receiver appointed by the Board demands possession of the property, business, and assets of any association, or of any part thereof, the refusal by any director, officer, employee, or agent of such association to comply with the demand shall be punishable by a fine of not more than $5,000 or imprisonment for not more than one year, or both.

(13)(A) As used in this subsection—

(1) The terms "cease-and-desist order which has become final" and "order which has become final" mean a cease-and-desist order, or an order, issued by the Board with the consent of the association or the director or officer or other person concerned, or with respect to which no petition for review of the action of the Board has been filed and perfected in a court of appeals as specified in paragraph (7)(B) of this subsection, or with respect to which the action of the court in which said petition is so filed is not subject to further review by the Supreme Court of the United States in proceedings provided for in said paragraph, or an order issued under paragraph (5)(A) of this subsection.

(2) The term "State" includes the Commonwealth of Puerto Rico.

(3) The term "territory" includes any possession of the United States and any place subject to the jurisdiction of the United States.

(4) The terms "district", "district court", "district court of the United States", and "judicial district" shall have the meanings defined in section 451 of Title 28.

(B) As used in paragraph (4) of this subsection, the term "violation" includes without limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

(14) As used in this subsection, the terms "Federal savings and loan association" and "association" shall include any institution with respect to which the Federal Home Loan Bank Board now or hereafter has any statutory power of examination or supervision under any Act or joint resolution of Congress other than this chapter, the Federal Home Loan Bank Act, and the National Housing Act. For the purposes of this paragraph (14), references in this subsection to directors, officers, employees, and agents, or to former directors or officers, of associations shall be deemed to be references respectively to directors, officers, employees, and agents, or to former directors or officers, of such institutions, references therein to savings account holders and to members of associations shall be deemed to be references to holders of withdrawable accounts in such institutions, and references therein to boards of directors of associations shall be deemed to be references to boards of directors or other governing boards of such institutions. Said Board shall have power by regulation to define, for purposes of this paragraph (14), terms used or referred to in the sentence next preceding and other terms used in this subsection.

(e) Qualifications of incorporators; selection of localities for establishment.

No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions.

(f) Associations as members of Federal Home Loan Bank.

Each such association, upon its incorporation, shall become automatically a member of the Federal Home Loan Bank of the district in which it is located, or if convenience shall require and the Board approve, shall become a member of a Federal Home Loan Bank of an adjoining district. Such associations shall qualify for such membership in the manner provided in the Federal Home Loan Bank Act with respect to other members.

(g) Subscription to preferred stock by United States; retirement.

The Secretary of the Treasury is authorized on behalf of the United States to subscribe for preferred shares in such associations which shall be preferred as to the assets of the association and which shall be entitled to a dividend, if earned, after payment of expenses and provision for reasonable reserves, to the same extent as other shareholders. It shall be the duty of the Secretary of the Treasury to subscribe for such preferred shares upon the request of the Board; but the subscription by him to the shares of any one

association shall not exceed $100,000, and no such subscription shall be called for unless in the judgment of the Board the funds are necessary for the encouragement of local home financing in the community to be served and for the reasonable financing of homes in such community. Payment on such shares may be called from time to time by the association, subject to the approval of the Board and the Secretary of the Treasury; but the amount paid in by the Secretary of the Treasury shall at no time exceed the amount paid in by all other shareholders, and the aggregate amount of shares held by the Secretary of the Treasury shall not exceed at any time the aggregate amount of shares held by all other shareholders. To enable the Secretary of the Treasury to make such subscriptions when called there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000, to be immediately available and to remain available until expended. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by the Board, and such receipts shall be evidence of the interest of the United States in such preferred shares to the extent of the amount so paid. Each such association shall make provision for the retirement of its preferred shares held by the Secretary of the Treasury, and beginning at the expiration of five years from the time of the investment in such shares, the association shall set aside one-third of the receipts from its investing and borrowing shareholders to be used for the purpose of such retirement. In case of the liquidation of any such association the shares held by the Secretary of the Treasury shall be retired at par before any payments are made to other shareholders.

(h) Exemptions from taxation.

No State, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.

(i) Conversion of member of Federal Home Loan Bank into Federal Savings and Loan Association; conversion of Federal Savings and Loan Association into State-chartered institution.

Any member of a Federal Home Loan Bank may convert itself into a Federal savings and loan association under this chapter upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this chapter.

Any Federal savings and loan association may convert itself into a savings and loan type of institution organized pursuant to the laws of the State, District, or Territory (hereinafter referred to in this section as the State) in which the principal office of such Federal association is located: *Provided,* (1) That the State permits the conversion of any savings and loan type of institution of such State into a Federal savings and loan association; (2) that such conversion of a Federal savings and loan association into such a State institution is determined upon the vote in favor of

such conversion cast in person or by proxy at a special meeting of members called to consider such action, specified by the law of the State in which the home office of the Federal association is located, as required by such law for a State-chartered institution to convert itself into a Federal association, but in no event upon a vote of less than 51 per centum of all the votes cast at such meeting, and upon compliance with other requirements reciprocally equivalent to the requirements of such State law for the conversion of a State-chartered institution into a Federal association; (3) that notice of the meeting to vote on conversion shall be given as herein provided and no other notice thereof shall be necessary; the notice shall expressly state that such meeting is called to vote thereon, as well as the time and place thereof, and such notice shall be mailed, postage prepaid, at least twenty and not more than thirty days prior to the date of the meeting, to each member of record of the Federal association at his last address as shown on the books of the Federal association and to the General Manager of the Federal Savings and Loan Insurance Corporation, Washington, District of Columbia; (4) that, upon the effective date of the conversion, the association has repurchased the total amount invested in its shares by the Secretary of the Treasury; and (5) that if, upon the effective date of conversion, the Home Owners' Loan Corporation will hold of record shares of the association, its approval of the conversion has been obtained; (6) that, in the event of dissolution after conversion, the members or shareholders of the association will share on a mutual basis in the assets of the association in exact proportion to their relative share or account credits; (7) that such conversion shall be effective

upon the date that all the provisions of this chapter shall have been fully complied with and upon the issuance of a new charter by the State wherein the association is located; it being provided that its act of converting into a State-chartered institution shall constitute an agreement to be bound by all the requirements that the Federal Savings and Loan Insurance Corporation may legally impose under section 1726 of this title, and the association shall upon conversion and thereafter be authorized to issue securities in any form currently approved at the time of issue by the Federal Savings and Loan Insurance Corporation for issuance by similar insured institutions in such State, District, or Territory.

In addition to the foregoing provision for conversion upon a vote of the members only any association chartered as a Federal savings and loan association, including any having outstanding shares held by the Secretary of the Treasury or Home Owners' Loan Corporation, may convert itself into a State institution upon an equitable basis, subject to approval, by regulations or otherwise, by the Federal Home Loan Bank Board and by the Federal Savings and Loan Insurance Corporation: *Provided,* That if the insurance of accounts is terminated in connection with such conversion, the notice and other action shall be taken as provided by law and regulations for the termination of insurance of accounts.

(j) Subscription to full-paid income shares by United States.

In addition to the authority to subscribe for preferred shares in Federal savings and loan associations, the Secretary of the Treasury is authorized on behalf of the United States to subscribe for any amount of full

paid income shares in such associations, and it shall be the duty of the Secretary of the Treasury to subscribe for such full paid income shares upon the request of the Federal Home Loan Bank Board. Payment on such shares may be called from time to time by the association, subject to the approval of said Board and the Secretary of the Treasury, and such payments shall be made from the funds appropriated pursuant to subsection (g) of this section; but the amount paid in by the Secretary of the Treasury for shares under this subsection and said subsection (g), together shall at no time exceed 75 per centum of the total investment in the shares of such association by the Secretary of the Treasury and other shareholders. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by said Board and such receipts shall be evidence of the interest of the United States in such full paid income shares to the extent of the amount so paid. No request for the repurchase of the full paid income shares purchased by the Secretary of the Treasury shall be made for a period of five years from the date of such purchase, and thereafter requests by the Secretary of the Treasury for the repurchase of such shares by such associations shall be made at the discretion of the Board; but no such association shall be requested to repurchase any such shares in any one year in an amount in excess of 10 per centum of the total amount invested in such shares by the Secretary of the Treasury. Such repurchases shall be made in accordance with the rules and regulations prescribed by the Board for such associations.

(k) Federal savings and loan associations or Federal Home Loan Banks as fiscal agents of United States.

When designated for that purpose by the Secretary of the Treasury, any Federal savings and loan association or member of any Federal Home Loan Bank may be employed as fiscal agent of the Government under such regulations as may be prescribed by said Secretary and shall perform all such reasonable duties as fiscal agent of the Government as may be required of it. Any Federal savings and loan association or member of any Federal Home Loan Bank may act as agent for any other instrumentality of the United States when designated for that purpose by such instrumentality of the United States.

§ 1465. Encouragement of saving and home financing.

To enable the Board to encourage local thrift and local home financing and to promote, organize, and develop the associations herein provided for or similar associations organized under local laws, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $150,000, to be immediately available and remain available until expended, subject to the call of the Board, which sum, or so much thereof as may be necessary, the Board is authorized to use in its discretion for the accomplishment of the purposes of this section without regard to the provisions of any other law governing the expenditure of public funds. For the purposes of this section the Secretary of the Treasury is authorized and directed to allocate and make immediately available to the Board, out of the funds appropriated pursuant to section 1464 (g) of this title, the sum of $700,000. Such sum shall be in addition

to the funds appropriated pursuant to this section, and shall be subject to the call of the Board and shall remain available until expended. The sums appropriated and made available pursuant to this section shall be used impartially in the promotion and development of local thrift and home-financing institutions, whether State or Federally chartered.

§ 1466. Territorial application.

The provisions of this chapter shall apply to the continental United States (including Alaska), to the State of Hawaii, and to Puerto Rico, Guam and the Virgin Islands.

§ 1466a. District of Columbia Savings and Loan Associations.

(a) Powers and functions of Board as to examination, operation, and regulation; enforcement provisions.

Without regard to any provision of law other than this section, and without limitation on any other power or function now or hereafter vested in or exercisable by the Federal Home Loan Bank Board by or under this chapter or otherwise, the Board shall, with respect to all incorporated or unincorporated building, building or loan, building and loan or homestead associations, and similar institutions, of or transacting or doing business in the District of Columbia, or maintaining any office in the District of Columbia (other than Federal savings and loan associations), have the same powers and functions as to examination, operation, and regulation as are now or hereafter vested in or exercisable by it with respect to Federal savings and loan associations by or under section 1464 of this title or otherwise, and all of the provisions of subsection

(d) of section 1464 of this title as now or hereafter in force shall be applicable with respect to such associations, or institutions.

(b) Statutory authorities.

Any such association or institution incorporated under the laws of, or organized in, the District of Columbia shall have in addition to any existing statutory authority such statutory authority as is from time to time vested in Federal savings and loan associations.

(c) Amendment of organic documents; voting.

Charters, certificates of incorporation, articles of incorporation, constitutions, bylaws, or other organic documents of associations or institutions referred to in subsection (b) of this section may, without regard to anything contained therein or otherwise, hereafter be amended in such manner and to such extent and upon such vote or votes if any as the Federal Home Loan Bank Board may by regulation or otherwise provide.

(d) Conversion into Federal Savings and Loan Associations; same regulations for District and Federal Associations.

Nothing herein shall cause, or permit the Federal Home Loan Bank Board to cause, District of Columbia associations to be or become Federal savings and loan associations, or require the Board to impose on District of Columbia associations the same regulations as are imposed on Federal savings and loan associations.

§ 1468. Separability clause.

If any provision of this chapter, or the application thereof to any person or circumstances, is held invalid, the remainder of the chapter, and the application of

such provision to other persons or circumstances, shall not be affected thereby.

§ 1469. Authority to invest in state housing corporations.

The Congress finds that Federal savings and loan associations and national banks should have the authority to assist in financing the organization and operation of any State housing corporation established under the laws of the State in which the corporation will carry on its operation. It is the purpose of this section to provide a means whereby private financial institutions can assist in providing housing, particularly for families of low- or moderate-income, by purchasing stock of and investing in loans to any such State housing corporation situated in the particular State in which the Federal savings and loan association or national bank involved is located.

§ 1470. Federal supervision of insured institutions, State member and nonmember banks; access to information; definitions.

(a)(1) The Federal Savings and Loan Insurance Corporation with respect to insured institutions, the Board of Governors of the Federal Reserve System with respect to State member insured banks, and the Federal Deposit Insurance Corporation with respect to State nonmember insured banks shall by appropriate rule, regulation, order, or otherwise regulate investment in State housing corporations.

(2) A State housing corporation in which financial institutions invest under the authority of this section shall make available to the appropriate Federal supervisory agency referred to in paragraph (1) such information as may be necessary to insure that investments are properly made in accordance with this section.

(b) For the purposes of this section and any Act amended by this section—

(1) The term "insured institution" has the same meaning as in section 1724(a) of this title.

(2) The terms "State member insured banks" and "State nonmember insured banks" have the same meaning as when used in the Federal Deposit Insurance Act.

(3) The term "State housing corporation" means a corporation established by a State for the limited purpose of providing housing and incidental services, particularly for families of low or moderate income.

(4) The term "State" means any State, the District of Columbia, Guam, the Commonwealth of Puerto Rico, and the Virgin Islands.

Notice of Appeal to the Supreme Court of the United States.

In the United States Court of Appeals for the Ninth Circuit.

Conference of Federal Savings and Loan Associations, et al., Plaintiffs-Appellees, v. Alan L. Stein, Successor in Office to Richard T. Silberman, as Secretary of the Business and Transportation Agency of the State of California, Defendant-Appellant.

Federal Home Loan Bank Board, Cross Claimant-Appellee, v. Alan L. Stein, etc., Cross Defendant-Appellant. No. 78-3201.

Filed Nov. 19, 1979.

NOTICE IS HEREBY GIVEN that Alan L. Stein, Successor in office to Richard T. Silberman, as Secretary of the Business and Transportation Agency of the State of California, the defendant-appellant above named, hereby appeals to the Supreme Court of the United States from the Judgment in this action entered on September 26, 1979.

This appeal is taken pursuant to Title 28 U.S.C. § 1254(2).

DATED: November 15, 1979.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL.

State of California, City and County of Los Angeles—ss:

Helen Andranian, being first duly sworn on oath, deposes and states:

I am over 18 years of age, and not a party to the within cause; my business address is 1800 Century Park East, Los Angeles, California 90067; I served a copy of the attached NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on each of the following, by placing same in an envelope(s) addressed as follows:

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Each said envelope was then, on November 15, 1979, sealed and deposited in the United States Mail at Los Angeles, California, the county in which I am employed, with the postage thereon fully prepaid.

/s/ Helen Andranian
Affiant

Subscribed and sworn to before me this 15th day of November, 1979.

/s/ Susan K. Anderson
Notary Public in and for said
County and State
[Seal]

Supreme Court, U. S.
FILED
FEB 26 1980

No. 79-923

In the Supreme Court of the United States

OCTOBER TERM, 1979

ALAN L. STEIN, As Secretary of the Business and Transportation Agency of the State of California,
APPELLANT

v.

CONFERENCE OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS, A California corporation, etc., and FEDERAL HOME LOAN BANK BOARD

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF THE FEDERAL HOME LOAN BANK BOARD TO AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-923

ALAN L. STEIN, As Secretary of the Business and Transportation Agency of the State of California,
APPELLANT

v.

CONFERENCE OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS,
A California corporation, etc., and
FEDERAL HOME LOAN BANK BOARD

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF THE FEDERAL HOME LOAN BANK BOARD TO AFFIRM

The Solicitor General, on behalf of the Federal Home Loan Bank Board, moves that the judgment of the court of appeals be affirmed.

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1-10) is reported at 604 F.2d 1256. The opinion of the district court (J.S. App. 16-23) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1979. A notice of appeal to this Court was filed on November 19, 1979 (J.S. App. 80-81) and the jurisdictional statement was filed on December 13, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

QUESTION PRESENTED

Whether, as applied to federal savings and loan associations, the regulatory provisions of the California Housing Financial Discrimination Act of 1977 are preempted by the comprehensive regulatory authority of the Federal Home Loan Bank Board under the Home Owners' Loan Act of 1933.

STATEMENT

1. The Federal Home Loan Bank Board ("Board") is an independent agency of the United States. 12 U.S.C. 1437(b). It has authority under Section 5(a) of the Home Owners' Loan Act of 1933 ("HOLA"), 12 U.S.C. 1464, to charter, examine, supervise and regulate federal savings and loan associations.

In December 1977 the Secretary of the Business and Transportation Agency of California ("Secretary") sent a letter to all federal savings and loan associations located in California. The Secretary informed the federally-chartered associations that, under the California Housing Financial Discrimination Act of 1977, Cal. Health and Safety Code § 35800 *et seq.* (West. Supp. 1979), they were required to comply with the state's "anti-redlining" law[1] and must post a specific notice in a conspicuous location at their respective places of business and distribute a similar notice to all loan applicants (J.S. App. 20). On February 2, 1978, after being apprised of the Secretary's actions, the Board issued an opinion that federal law barred any attempt by officers of the State of California to apply the state law to federal savings and loan associations.

2. The Conference of Federal Savings and Loan Associations and certain individual associations then instituted this action in federal district court, seeking a declaration that federal law preempted application of the state "anti-redlining" law to federally-chartered loan associations (J.S. App. 20).[2] The district court granted the requested relief, concluding that "[t]he Bank Board's exercise of its plenary regulatory power granted by Congress under HOLA

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[1] The practice of "redlining" involves lender discrimination against applicants seeking loans in particular geographical areas with the effect, *inter alia*, of reducing the availability of family housing, impairing property values and perpetuating racial and economic segregation in the affected area. See J.S. App. 5, 20; J.S. 4.

[2] The Board was named as a nominal defendant but supported plaintiffs' request for declaratory relief.

preempts legislation by the State of California which attempts to subject Federal savings and loan associations in California to state regulation and discipline in the area of anti-redlining practices" (J.S. App. 22).[3]

The court of appeals affirmed. The court concluded that the substantive nondiscrimination requirements of the state law were not at issue in this case because respondents have challenged only the state's procedural, regulatory requirements—such as information posting and administrative monitoring and resolution of consumer complaints (J.S. App. 9). The court held that these state regulatory procedures were preempted because "the regulatory control of the Bank Board over federal savings and loan associations is so pervasive as to leave no room for state regulatory control" (J.S. App. 9). The court declined to consider whether the substantive provisions of the state law could be enforced against the federal associations (J.S. App. 9, 10), holding only that nondiscrimination regulations promulgated by the Bank Board under HOLA "wholly pre-empt the field of regulatory control over these associations" (J.S. App. 10).

[3] On February 28, 1978, the Secretary filed an action against an individual federal savings and loan association in state superior court for declaratory relief and civil penalties for failure to comply with the regulatory provisions of the state "anti-redlining" law (J.S. App. 20-21). The Bank Board moved the federal district court for an injunction against the state enforcement proceedings. The district court ruled that an injunction "would appear to be unnecessary" in light of its disposition of this suit (J.S. App. 14).

ARGUMENT

Since 1972, the Board has barred discriminatory lending practices by federal savings and loan associations (12 C.F.R. 528, 531.8). Since 1978, the Board has amplified that prohibition by promulgating comprehensive anti-redlining regulations applicable to all federal associations. See 43 Fed. Reg. 22332 (1978).[4] There is thus no question in this case that federal savings and loan associations are prohibited from discrimination and redlining in their lending practices. The question in this case is whether California—and, by extension, every other state or local jurisdiction—can superimpose upon the federal regulatory scheme an additional comprehensive set of procedures to achieve nondiscrimination goals.[5] The court of appeals correctly determined that the result-

[4] These regulations were adopted pursuant to the HOLA, not pursuant to the Equal Credit Opportunity Act, 15 U.S.C. 1691, *et seq.* ("ECOA"), as amicus N.A.A.C.P. Legal Defense Fund suggests (Br. 1-5). The Board's 1972 regulation, which preceded enactment of the state's legislation by five years, expressly notes that the Board relied on Section 5(a) of the HOLA, not ECOA, as the source of its authority to issue the regulations. 37 Fed. Reg. 8437 (1972). Similarly the Board's 1978 amendments to its fair lending regulations state that the amendments are promulgated pursuant to authority delegated to the Board under the HOLA. 43 Fed. Reg. 22332 (1978). In adopting 12 C.F.R. 545.6a, effective March 14, 1979, the Board once again stated that Section 5 of the HOLA is the basis for its fair lending requirements for federal associations. 44 Fed. Reg. 15479 (1979).

[5] The state may, of course, apply its nondiscrimination regulations to state-chartered lenders that are not federal savings and loan associations.

ing maze of state, local and federal rules would conflict with the Board's statutory mandate to provide a uniform national standard for the lending practices of federal savings and loan associations, including comprehensive prohibitions against discrimination and redlining. The court thus properly held that "the regulatory control of the Bank Board over federal savings and loan associations is so pervasive as to leave no room for state regulatory control" (J.S. App. 9) and that nothing in any other federal statute, including Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.*, the Equal Credit Opportunity Act, 15 U.S.C. 1691 *et seq.* ("ECOA") and the Home Mortgage Disclosure Act, 12 U.S.C. 2801 *et seq.* ("HMDA"), requires a different result.

1. As this Court has observed on two occasions, the purpose of the HOLA is to empower the Board to create an exclusive uniform national regulatory standard to govern the operation of federal savings and loan associations and thus protect "federal associations from being forced into the state regulatory mold." *First Federal Savings & Loan Association* v. *Massachusetts Tax Commission*, 437 U.S. 255, 258 n.3 (1978).[6] See also *Hopkins Savings Association*

[6] *Massachusetts Tax Commission* involved an interpretation of Section 5(h) of the HOLA, 12 U.S.C. 1464(h), which grants authority to the states to impose nondiscriminatory taxes on federal associations. The Court held that such a tax is not invalid because it recognizes that state and federal regulations may differ. "There is no reason to believe that § 5(h) was intended to force state and federal regulation into the same mold." 437 U.S. at 258.

v. *Cleary*, 296 U.S. 315, 333 (1935). Accordingly, every court of appeals to have considered the question has concluded that the HOLA and the regulations promulgated by the Board constitute a comprehensive federal regulatory scheme that preempts all state regulation of the lending practices of federal savings and loan associations.[7] These decisions are

[7] See, *e.g.*, *First Federal Savings Loan Ass'n of Boston* v. *Greenwald*, 591 F.2d 417 (1st Cir. 1979); *Kupiec* v. *Republic Federal Savings & Loan Ass'n*, 512 F.2d 147, 150 (7th Cir. 1975); *Meyers* v. *Beverly Hills Federal Savings & Loan Ass'n*, 499 F.2d 1145, 1147 (9th Cir. 1974). See also *Rettig* v. *Arlington Heights Federal Savings & Loan Ass'n*, 405 F. Supp. 819, 823 (N.D. Ill. 1975); *City Federal Savings and Loan Ass'n* v. *Crowley*, 393 F. Supp. 644, 655 (E.D. Wis. 1974); *Lyons Savings & Loan Ass'n* v. *Federal Home Loan Bank Board*, 377 F. Supp. 11, 17 (N.D. Ill. 1974); *Elwert* v. *Pacific First Federal Savings and Loan Ass'n*, 138 F. Supp. 395, 399-400 (D. Or. 1956); *California* v. *Coast Federal Savings & Loan Ass'n*, 98 F. Supp. 311, 318-319 (S.D. Cal. 1951); *Washington Federal Savings and Loan Ass'n. of Miami* v. *Balaban*, 281 So. 2d 15, 17 (Fla. 1973); *Kaski* v. *First Federal Savings and Loan Ass'n of Madison*, 240 N.W. 2d 367 (Wis. 1976).

Appellant suggests (J.S. 30 n.21) that *Durnin* v. *Allentown Federal Savings and Loan Association*, 218 F. Supp. 716 (E.D. Pa. 1963), held that state law may apply to the practices of federal associations. But *Durnin* stands only for the proposition that, in the absence of an express Board regulation, general common law governs a member's right of access to an association's membership list. *Id.* at 719. See also *Murphy* v. *Colonial Federal Savings & Loan Association*, 388 F.2d 609, 611 (2d Cir. 1967), holding that federal common law may be applied to fill gaps in Board regulations concerning the right of access to federal associations' membership lists. These cases are thus consistent with the conclusion that federal law preempts state regulation of federal associations, particularly where—as here—the state law in-

especially applicable here, where state regulatory procedures would intrude into an area governed expressly by comprehensive Board regulations.

Appellant's principal contention (J.S. 14-24) is that the ordinary rule that the HOLA preempts all state regulation of federal savings and loan association is inapplicable in this case because, in enacting Title VIII of the Civil Rights Act of 1968, the ECOA, and the HMDA, Congress specifically authorized the states to regulate discrimination in lending by federal savings and loan associations. This contention is incorrect and does not warrant plenary consideration by this Court.

a. Appellant argues (J.S. 16-20) that the language and legislative history of the Equal Credit Opportunity Act authorizes state regulation of credit discrimination and indicates that Congress did not intend that HOLA preempt state regulation in this limited area. But, in enacting ECOA, Congress expressly provided that compliance with its nondiscrimination requirements is to be enforced by the Board. 15 U.S.C. 1691c(a)(2). By conferring this enforcement authority on the Board, Congress reaffirmed its intent to preclude state regulation of federal savings and loan associations.

The savings clause in 15 U.S.C. 1691d(f) provides that ECOA "does not annul, alter, or affect, or exempt

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trudes into an area governed expressly by comprehensive Board regulations.

The remaining cases cited by appellants (J.S. 24-31) do not involve the HOLA or Board regulations and are therefore inapposite.

any person * * * from complying with the laws of any state with respect to credit discrimination * * *." The legislative history reflects that the savings clause does not affirmatively authorize state regulation of federal associations, but merely protects the state's ability to regulate credit institutions previously subject to state control.[8] In enacting ECOA, C[illegible]ss rejected a Senate proposal that would have "prevent[ed] any federal supervisory agency from exempting federally chartered financial institutions from complying with any State law or regulation which protects borrowers at those institutions * * *." H.R. Rep. No. 93-1429, 93d Cong., 2d Sess. 4 (1974). By preserving the Board's jurisdiction over federal savings and loan associations, Congress ensured that, while ECOA left the states free to apply their laws to persons already subject to state authority, the

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[8] Appellant argues (J.S. 16) that HOLA cannot preempt state regulation unless the Board of Governors of the Federal Reserve System first determines that there is an inconsistency between state and federal law pursuant to 15 U.S.C. 1691d(f). But the provision to which appellant refers is wholly inapplicable to this case. 15 U.S.C. 1691d(f) refers only to an application by a *state* for an exemption from ECOA for certain types of credit transactions. See 12 C.F.R. 202.12 (Truth-in-Lending); Supplement I to regulation B (see 12 C.F.R. at 489). The exemptions granted by the Federal Reserve Board have explicitly excepted transactions in which a federally-chartered institution is a creditor because federally-chartered institutions remain subject to the enforcement authority of federal agencies. See, *e.g.*, Supplement I to Regulation B of ECOA n.4; Supplement III to Regulation Z.

states could not extend their jurisdiction to regulate federal associations.

b. Appellant's reliance on Title VIII of the Civil Rights Act of 1968 is similarly misplaced. That Act does not authorize state credit regulation of federal associations; it merely provides that Title VIII itself does not "invalidate or limit any law of a State * * *." 42 U.S.C. 3615. The Board does not contend that Title VIII invalidates or limits any state law. The Board relies on the HOLA, not Title VIII or ECOA, as the basis for federal preemption. See pages 5-8 and note 4, *supra*.

c. The history of the Home Mortgage Disclosure Act supports the conclusion that the Board retains exclusive regulatory authority over the credit practices of federal savings and loan associations. The HMDA was enacted to require disclosure of mortgage data by financial institutions making federally-related mortgage loans. While the Act does not declare the practices of "redlining" to be unlawful, it requires the publication of mortgage data to discourage the practice of redlining by making it visible. A comparison of draft versions of the HMDA with the statute as finally approved, together with relevant legislative history, indicates that Congress contemplated that the redlining practices of federally-chartered institutions would be governed exclusively by federal law.

Section 306 of the original House and Senate versions of the Act (H.R. 10024, 94th Cong., 1st Sess.

(1975); S. 1281, 94th Cong., 1st Sess. (1975)) provided that it would not exempt "any person" in a state from complying with state laws on disclosure and recordkeeping unless state law was inconsistent with the HMDA's requirements. The apparent intent of this draft provision was to include both state and federally-chartered financial institutions within the definition of a "person" subject to state requirements. See H.R. Rep. No. 94-561, 94th Cong., 1st Sess. 13 (1975). Congressman Stephens, however, offered amendments to ensure that the HMDA would not alter the Board's exclusive regulatory authority over federal savings and loan associations. As Congressman Stephens explained (121 Cong. Rec. 34564 (1975)):

> The difficulty, so far as the language of the present statute is concerned, is that it is not clear whether State regulation will be adhered to or whether Federal regulation will be adhered to in a savings and loan company if there is a difference between the State regulation and the Federal regulation.
>
> So far as these federally controlled savings and loan associations are concerned, they have always been regulated by the Federal Home Loan Bank Board. The Federal Home Loan Bank Board in considering the language of the statute, says it is not clear whether that is to be continued or not. This is what the Board has asked to be done, and this is why I offered the amendment.

The amendment proposed by Congressman Stephens was adopted as Section 306 of the Act, 12 U.S.C.

2805, which provides in part as follows (emphasis supplied):

> (a) This chapter does not annul, alter, or affect, or exempt any *State chartered* depository institution subject to the provisions of this chapter from complying with the laws of any State or subdivision thereof with respect to public disclosure and recordkeeping by depository institutions, except to the extent that those laws are inconsistent with any provision of this chapter * * *.
>
> (b) The Board may by regulation exempt from the requirements of this chapter any *State chartered* depository institution within any State or subdivision thereof, if it determines that, under the law of such State or subdivision, that institution is subject to requirements substantially similar to those imposed under this chapter * * *.

Congress adopted the Stephens amendment precisely for the purpose of ensuring that federally-chartered institutions need not comply with state law in the area of mortgage disclosure. See S. Conf. Rep. No. 94-553, 94th Cong., 1st Sess. 9-10 (1975); *Glenn Ellyn Savings and Loan Ass'n* v. *Tsoumas*, 71 Ill. 2d 493, 377 N.E. 2d 1, cert. denied, 439 U.S. 927 (1978).

Despite this clear expression of congressional intent, appellant maintains that Congress intended exclusive federal regulation to apply only to the disclosure of geographical mortgage lending statistics and that there was no intent to preempt the states

from regulating any other aspect of "redlining" discrimination in lending. But Representative Stephens made clear that federal preemption should apply to all aspects of credit regulation of federal associations; the fact that Section 306 is limited to the disclosure of geographical mortgage lending statistics reflects only the fact that that was the only subject addressed in the HMDA. It was unnecessary for Congress, in enacting the HMDA, to state that the Board has exclusive jurisdiction over all other aspects of credit regulation for federal associations because Congress provided that exclusive authority to the Board more than thirty years ago in enacting the HOLA. See *Fry* v. *United States*, 421 U.S. 542, 546 (1975).

In sum, contrary to appellant's contentions, recent federal statutes and consumer protection laws do not establish that Congress expressly authorized the states to regulate mortgage lending discrimination and "redlining" by federal savings and loan associations. Efforts to create an exception to the Board's exclusive regulatory and supervisory authority under HOLA have repeatedly been rejected by Congress, which has reaffirmed its intention to retain a single, federal regulatory authority to supervise the credit activities of federally-chartered savings and loan associations.

2. The Board does not contend, as appellant suggests (J.S. 29-31), that federal preemption under HOLA applies to matters of purely local concern, such as zoning for property held by federal associations or employee health and safety regulations. The exclusive

authority conferred on the Board by the HOLA concerns only the credit practices and business affairs of federal associations, including their internal organization and external commercial relations.

This Court has concluded on two occasions that, in enacting HOLA, Congress intended to establish a uniform scheme of federal regulation of federal associations. Moreover, appellant and the amici have recognized that the Board has exercised its exclusive authority in the precise context of prohibiting "redlining" discrimination and they do not question the adequacy of the Board's regulations or the effectiveness of the Board's enforcement efforts under the regulations. This case thus fails to present any novel or unsettled question of federal law and does not warrant plenary review.

CONCLUSION

The judgment of the court of appeals should be affirmed.[9]

Respectfully submitted.

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[9] Because the court of appeals expressed no disagreement with the Secretary's interpretation of the state statute's regulatory procedures as applicable to federal associations, we believe that court's decision is properly interpreted as holding the state statute as so applied invalid under the Supremacy Clause—and that affirmance by this Court is therefore the appropriate disposition. If, however, this Court were to conclude that the court of appeals interpreted the state statute as inapplicable, in light of the pervasive federal regulatory scheme, then the appropriate disposition would be to dismiss the appeal and, treating the papers whereon the appeal was taken as a petition for a writ of certiorari (under 28 U.S.C. 2103), to deny certiorari for the reasons stated in this Motion to Affirm.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-923

ALAN L. STEIN, Successor in Office to RICHARD T. SILBERMAN, as Secretary of the Business and Transportation Agency of the State of California,

Appellant,

vs.

CONFERENCE OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS, a California corporation, et al., and FEDERAL HOME LOAN BANK BOARD,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF NONGOVERNMENTAL APPELLEES TO DISMISS OR AFFIRM PURPORTED APPEAL

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-923

ALAN L. STEIN, Successor in Office to RICHARD T. SILBERMAN, as Secretary of the Business and Transportation Agency of the State of California,

Appellant,

vs.

CONFERENCE OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS, a California corporation, et al., and FEDERAL HOME LOAN BANK BOARD,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF NONGOVERNMENTAL APPELLEES TO DISMISS OR AFFIRM PURPORTED APPEAL

Appellees Conference of Federal Savings and Loan Associations, a California corporation, and Alameda Federal Savings and Loan Association, Bay View Federal Savings and Loan Association, California Federal Savings and Loan Association, Coast Federal Savings and Loan Association, Eureka Federal Savings and Loan Association, First Federal Savings and Loan Association of San Diego, First Federal Savings and Loan Association of Santa Monica, First Federal Savings and Loan Association of South Pasadena, Home Federal Savings

and Loan Association of San Diego, Orange Belt Federal Savings and Loan Association, Pacific Federal Savings and Loan Association, Peoples Federal Savings and Loan Association, Pomona First Federal Savings and Loan Association, Provident Federal Savings and Loan Association of Riverside, Redlands Federal Savings and Loan Association, Republic Federal Savings and Loan Association, San Francisco Federal Savings and Loan Association, Santa Fe Federal Savings and Loan Association, The Heart Federal Savings and Loan Association, and Western Federal Savings and Loan Association ("the federal associations") hereby move, pursuant to Rule 16 of the Rules of the United States Supreme Court, to dismiss the purported appeal of Appellant Alan L. Stein, successor in office to Richard T. Silberman, as Secretary of the Business and Transportation Agency of the State of California ("the Secretary") from the judgment of the United States Court of Appeals for the Ninth Circuit ("the Court of Appeals") in *Conference of Federal Savings and Loan Associations, et al. v. Alan L. Stein, etc.*, No. 78-3201 ("said judgment") or, in the alternative, to affirm said judgment, on each and all of the following grounds:

1. Said judgment did not hold a state statute repugnant to the Constitution, treaties or laws of the United States within the meaning of 28 U.S.C. §1254(2); and

2. The purported appeal fails to present a question of law which is sufficiently substantial to warrant further argument.[1]

[1] At the commencement of the litigation from which the within purported appeal arises the office of the Secretary, which is presently held by Alan L. Stein, was held by a Richard T. Silberman. Since the individual identities of the persons holding the office of the Secretary are of no legal significance in the premises, both Silberman and Stein are each referred to simply as "the Secretary" without distinction between them.

I

ALLEGED BASIS OF JURISDICTION

The Secretary predicates United States Supreme Court jurisdiction over the instant purported appeal exclusively upon 28 U.S.C. §1254(2), which provides as follows:

> "Cases in the courts of appeal may be reviewed by the Supreme Court. . .
>
> * * *
>
> "By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal question presented."

II

STATEMENT OF THE QUESTION

The only question legitimately presented by the instant purported appeal is whether federal law precludes the Secretary from regulating federal associations in California by imposing upon them certain procedural requirements of California Health and Safety Code §35800 *et seq.* ("the state 'fair lending' law").[2]

[2] The statement of the Secretary to the contrary notwithstanding ("Jurisdictional Statement", pp. 1-2), the judgment of the United States Court of Appeals for the Ninth Circuit did *not* hold that the state "fair lending" law, "insofar as it applies to federally chartered savings and loan associations, is unconstitutional in that it violates Article VI, cl. 2 of the United States Constitution". As set forth in § IV A., *infra,* the Court of Appeals never reached the question of whether the state "fair lending" law was intended to apply to federal associations and, accordingly, did *not* determine—and, indeed, could not have determined—that the California "fair lending" law was even invalid, much less unconstitutional.

III

STATEMENT OF THE CASE

A. ***The Parties.***

The Appellant, the Secretary, is the Chief Executive Officer of the Business and Transportation Agency of the State of California, an agency which consists, *inter alia,* of the California Department of Savings and Loan, the California Department of Real Estate, and the California State Banking Department. (California Government Code §§13975 and 13976.) He "has the power of general supervision over, and is directly responsible to the Governor [of the State of California] for the operations of each department, office, and unit within the agency"; and he "may issue such orders as he deems appropriate to exercise any power or jurisdiction or to assume or discharge any responsibility, or to carry out or effect any of the purposes vested by law in any department in the agency". (California Government Code §13978.) Accordingly, he exercises supervisory and regulatory authority over the operations of savings and loan associations chartered under the laws of the State of California.

One of the Appellees in the within appeal is the Federal Home Loan Bank Board ("the Board"), an independent federal agency.[3] It is charged by federal law, the Home

[3] 12 U.S.C. §1437(a) provides, in pertinent part:

> ". . . there shall be a board, to be known as the 'Federal Home Loan Bank Board', which shall consist of five [under 62 Stat. 1283 and 75 Stat. 832 the number has been reduced to three] citizens of the United States appointed by the President of the United States, by and with the advise and consent of the Senate.
>
> * * *
>
> "The board shall supervise the Federal Home Loan Banks created by this chapter, shall perform the other duties specifically prescribed by this chapter, and shall have power to adopt, amend, and require the observance of such rules, regulations, and orders as shall be necessary from time to time for carrying out the purposes of the provisions of this chapter."

Owners' Loan Act of 1933 ("HOLA") (12 U.S.C. §1464(a) *et seq.*), with the responsibility for the organization, incorporation, examination, operation and regulation of federal savings and loan associations:

> "In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations' . . . and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." (12 U.S.C. §1464(a).)

The remaining Appellees are the federal associations, consisting of a trade association the membership of which includes approximately sixty federally chartered savings and loan associations which have their principal places of business in California, and twenty individual federally chartered savings and loan associations, each of which has its principal place of business in California.

B. ***The Pertinent Facts.***

The Board has for many years prohibited "redlining", as well as other forms of arbitrary discrimination, in the lending practices of federally chartered savings and loan associations.

In 1972 the Board, pursuant to authority conferred upon it by various statutes, including § 5(a) of HOLA, 12 U.S.C. §1464(a), adopted a regulation, 12 C.F.R. §528.2, which provided, in pertinent part, that no federal association:

> ". . . shall deny a loan or other service . . . because of the race, color, religion, sex, or national origin of . . . [t]he

present or prospective owners . . . or occupant of other dwellings in the vicinity of the dwelling . . . in relation to which such loan or other service is to be made or given."[4]

The Board interpreted its regulations as prohibiting the use of appraisal forms which even called for information relating to the ethnicity of a neighborhood:

". . . to extend credit on the basis of an appraisal form which calls for information relating to the ethnic composition of a neighborhood violates . . . the Board's regulations [including 12 C.F.R. §528.2].

* * *

"The use of appraisal forms which calls for racial information regarding the neighborhood clearly violates the well-established legal prohibition against consideration of racial factors in real estate transactions." (Opinion of the General Counsel of the Federal Home Loan Bank Board, dated February 7, 1974.) (C.T., pp. 307-308.)

Moreover, and perhaps of even greater significance, the Board has interpreted its regulations as prohibiting lending practices which were discriminatory *in effect* even though not racially motivated in their origins:

"Section 528.2 of the Regulations of the Federal Home Loan Bank System prohibits denying a loan, or discriminating in fixing loan terms, 'because of the race, color, religion or national origin of . . . (d) the present or prospective owners, lessees, tenants or occupants of other dwellings in the vicinity of the dwelling or dwellings in relation to which such loan or other service is to be made or given'.

[4] Actually the regulation was applicable, subject to exceptions not here relevant, to "any institution which is a member of a Federal Home Loan Bank". All federal savings and loan associations are, by operation of law, members of a Federal Home Loan Bank. 12 U.S.C. §1464(f).

". . . [I]t is my opinion that the practice by member institutions of refusing to extend credit, and the practice of extending credit on terms which are less favorable than those usually offered, to borrowers whose security property is located within a predetermined geographic area or areas, because of the location of the property, violate section 528.2(d) if such practices have a discriminatory effect against members of racial, ethnic or religious groups. Although the question whether, in a particular situation, the practice of redlining has an unlawful discriminatory effect is essentially a question of fact, it is my opinion that in certain circumstances outlined below, a prima facie case of discrimination may be considered to be established, which must be rebutted by the institution concerned with clear evidence that the practice is a matter of business necessity and that no less discriminatory means are available to assure sound lending." (Opinion of the General Counsel of the Federal Home Loan Bank Board, dated March 21, 1974.) (C.T., pp. 309-310.)

On November 1 and 2, 1977, the Board adopted resolutions proposing, and on May 18, 1978, adopted a resolution finally promulgating, amended "fair lending" regulations, 12 C.F.R. §528. *The stated authorities for the promulgation of such new regulations included HOLA;* and the May 18 resolution adopting the amended regulations recited that "*it is the Bank Board's intent that Federally-chartered savings and loan institutions shall be governed solely by . . . [12 C.F.R. §§528 and 531.8]*". (*Federal Register,* Vol. 43, No. 102, p. 22333; emphasis added.)[5] Moreover, effective March 14, 1979, the Board promulgated another regulation, 12 C.F.R. § 545.6a, which provides that "[n]otwithstanding any state law to the contrary,

[5] Any representation by the Secretary or the *amici curiae* supporting his position (see, e.g., "Jurisdictional Statement", pp. 14-15; "Brief Amicus Curiae for the N.A.A.C.P. Legal Defense and Education Fund", pp. 1-5) that the Board's "fair lending" regulations were

(Footnote continued on following page)

Federal associations are governed solely by the fair lending provision of Part 528 and § 531.8 of the Rules and Regulations for the Federal Home Loan Bank System and other applicable Federal laws and regulations."

The new regulations augmented and strengthened the Board's prohibition against "redlining" and other forms of arbitrary discrimination by federal associations. They provide, *inter alia,* and in essence 1) that no federal association may discriminate in its lending practices and procedures "on the basis of the age or location of the dwelling, or on the basis of the race, color, religion, sex, or national origin" of the loan applicant or other person associated with the transaction, or may "use or rely upon an appraisal of a dwelling which the institution knows, or reasonably should know, is discriminatory on the basis of the age or location of the dwelling, or is discriminatory *per se* or in effect"; 2) that each federal association "shall have clearly written, nondiscriminatory loan underwriting standards [which are reviewed periodically], available to the public upon request, at each of its offices"; 3) that no federal association may "engage in any form of advertising which implies or suggests a policy of discrimination or exclusion in violation of Title VIII of the Civil Rights Act of 1968, the

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(Footnote continued from preceding page)

adopted exclusively pursuant to federal civil rights statutes such as the Equal Credit Opportunity Act, 15 U.S.C. §1691 *eq seq.* and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.,* and not pursuant to HOLA, is simply untrue.

That HOLA in and of itself authorizes the Board to promulgate "fair lending" regulations applicable to federal associations is clear. Under § 5(a) of HOLA, 12 U.S.C. 1464(a), the Board is mandated to regulate all aspects of the operation of federal associations, "giving primary consideration to the best practices of local mutual thrift and home financing institutions in the United States". The eschewment of "redlining" and other forms of arbitrary discrimination in mortgage lending is obviously such a "best practice" and thus within the power of the Board to order.

Like the original regulation, the amended regulations are applicable to all Federal Home Loan Bank members. (See footnote 4, *supra.*)

Equal Credit Opportunity Act, or this Part [12 C.F.R. §528]"; 4) that "[a]dvertisements other than for savings shall include a fascimile" of a specified logotype and either the legend "Equal Opportunity Lender" or "Equal Housing Lender", and that each federal association "shall post and maintain . . . in the lobby of each of its offices" a poster bearing a specified logotype and the legend "Equal Opportunity Lender" and apprising prospective borrowers of their legal rights.[6] The regulations also establish procedures for monitoring compliance therewith, including a requirement that federal associations prepare and maintain, and report to the Board based upon, certain records and data.

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[6] The prescribed text is as follows:

"WE DO BUSINESS IN ACCORDANCE WITH THE FEDERAL FAIR HOUSING LAW AND THE EQUAL CREDIT OPPORTUNITY ACT

IT IS ILLEGAL TO:

DISCOURAGE a loan inquiry or refuse to accept a written loan application;

DISCRIMINATE in fixing the amount, interest rate, duration, application procedures, or other terms or conditions of a loan; or

DENY a loan for the purpose of purchasing, constructing, improving, repairing or maintaining a dwelling.

ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, RELIGION, SEX, MARITAL STATUS OR AGE;

OR BECAUSE
A PERSON RECEIVES INCOME FROM A PUBLIC ASSISTANCE PROGRAM, OR HAS IN GOOD FAITH EXERCISED ANY RIGHT UNDER THE CONSUMER CREDIT PROTECTION ACT

* * *

IF YOU BELIEVE YOU HAVE BEEN DISCRIMINATED AGAINST, YOU MAY:

SPEAK with the management of this institution;

COMPLAIN to The Office of Community Investment, Federal Home Loan Bank Board, Washington, D.C. 20522 or the Assistant Secretary for Fair Housing and Urban Development, Washington, D.C. 20010; or

CONSIDER filing a civil suit under Federal Laws."

In addition, the Board has promulgated, pursuant to authority conferred by HOLA, extensive and highly detailed regulations governing the making and collateralization of mortgage loans by federally chartered savings and loan associations, 12 C.F.R. §545.6-9. Such regulations, *inter alia,* prescribe minimum ratios between the amount of the loan and the value of the real property hypothecated as security therefor.

Efforts by California to control "redlining" and other forms of arbitrary discrimination in lending did not commence until approximately four years after the Board had first promulgated its "fair lending" regulations. In mid 1976, however, an agency which operates under the aegis of the Secretary, the Department of Savings and Loan, promulgated pursuant to its general supervisory authority under California Financial Code §5255 a body of so-called "fair lending" regulations applicable to the state-chartered — but not federally chartered — savings and loan associations doing business in California. (10 Cal. Adm. Code Tit. 10, §245 *et seq.*)

Eventually, late in 1977, the State of California enacted California Health and Safety Code §35800 *et seq.* ("the state 'fair lending' law"). Among other things, it 1) prohibits "redlining" and other forms of arbitrary discrimination in lending by, *inter alia,* "any . . . savings and loan association . . . that regularly makes, arranges, or purchases loans for the purchase, construction, rehabilitation, improvement, or refinancing of housing accommodations"; 2) directs the Secretary to "issue such rules, regulations, guidelines and orders as are necessary" to implement, and to "monitor and investigate the lending patterns and practices of financial institutions for compliance" with, the substantive provisions of the statute; 3) provides that "[a]ny applicant for a real estate loan in connection with housing accommodation claimed to be aggrieved by an alleged violation . . . [of the substantive prohibitions of the statute] . . . may file a complaint with" the Secretary and "[i]mmediately upon receipt of the complaint,

the secretary shall endeavor to eliminate any alleged unlawful practice, by conference, conciliation, or persuasion"; 4) creates an administrative system, for redressing alleged violations of the substantive prohibitions of the legislation, under which the Secretary is authorized to order either "[t]he making of the financial assistance or the making of the financial assistance on nondiscriminatory terms" or "[t]he payment of damages to the complainant" in an amount of as much as $1,000; and 5) requires that certain notices be given by lenders to whom the statute is applicable.

The legislation did not contain a definition of the term "savings and loan association"; and in other California legislative contexts that term does *not* include federally chartered savings and loan associations. For example, for purposes of the California Savings and Loan Association Law, California Financial Code §5000 *et seq.,* a "'[s]avings and loan association' means any institution incorporated to conduct, or conducting, the business of receiving and lending money in accordance with the provisions of this part, *except federal savings and loan associations".* (California Financial Code §5057; emphasis added.) Moreover, California Financial Code §9257 provides that "[a]t the time the conversion [of a state-chartered savings and loan association] into a federal savings and loan association becomes effective *the association ceases to be supervised by this State. . . .*" (Emphasis added.)

Furthermore, *prior to the enactment of the state "fair lending" law, counsel for the Secretary in the within purported appeal and the chief legal officer of the state, the California Attorney General, had rendered a legal opinion that federal law precluded California from regulating the operations of federal savings and loan associations.* In 1964 California enacted a statute, California Financial Code §11500, *et seq.,* which imposed certain registration and reporting requirements upon savings and loan holding companies; and for purposes of the statute a "savings and loan holding company" was defined to

include persons or companies which control federal savings and loan associations (California Financial Code §11500). On August 24, 1964, however, in response to an inquiry from the then California Savings and Loan Commissioner, *the Attorney General opined that federal law preempted the field with respect to the supervision and regulation of federal associations and hence to the extent that the California statute purported to apply to persons or companies which controlled federal associations it was invalid:*

> "Federal savings and loan associations are organized under the Home Owners Loan Act of 1933. 48 Stat. 128 (1933), 12 U.S.C. §§1461-68 (1958). *A federal association is an instrumentality and agency of the United States.* [Citations omitted.] *The Federal Home Loan Bank Board is the regulatory agency charged with the duty of supervising federal associations. Congress has delegated the duty and authority to the Bank Board to make policy, including the power, 'under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of [federal] associations. . . .'* 48 Stat. 132 (1933), 12 U.S.C. §1464(a) (1958). The constitutionality of this delegation of authority was upheld in *Fahey v. Mallonee,* 332 U.S. 245 (1947). *The Bank Board has adopted comprehensive rules concerning the formation, operation, management, examination and liquidation of federal associations.* 12 C.F.R. §§541.1-555.11 (1963). *These rules have been described as regulating a federal association 'from its cradle to its corporate grave.'* [Citation omitted.] *Rules promulgated by the Bank Board have the force and effect of law.* [Citations omitted.]
>
> "Several terms have been used to describe the situation where state law must yield to the supremacy of the federal law—conflicting, contrary to, occupying the field, repugnancy, difference, irreconcilability, inconsistency, curtailment, interference, but 'in the final analysis, there

> can be no one crystal-clear distinctly marked formula.' [Citations omitted.] However, one test used by the courts is whether the scheme of federal regulation '[is] . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it'. [Citations omitted.]
>
> "*Courts that have considered the question of applying state regulations to federal associations have concluded there is no room for state supervision of federal associations.* [Citations omitted.]
>
> * * *
>
> "*In our opinion, the [California] Savings and Loan Holding Company Law reaches into an area — control and supervision of federal associations — which, under the authority cited above, has been pre-empted by Congress.*" (44 Attorney General's Opinions 50, pp. 53-54 (Sept. 1964); emphasis added.)

On December 14, 1977, after the state "fair lending" law had been enacted, but prior to its effective date, the Secretary met in Los Angeles, California, with "numerous officers of various savings and loan associations located within the State of California", including officers of federally chartered savings and loan associations, to discuss "so-called 'redlining' regulations which . . . [he] intended to issue pursuant to" the state "fair lending" law. At the meeting he "stated that he was not concerned with federal regulations and that it was his position that all savings and loan associations operating within the State of California, including federally chartered associations, would be required to operate under California state regulations irrespective of the provisions of federal regulations". (C.T., p. 100, line 24 to p. 101, line 10.)

The Secretary then sent to the federal associations, *inter alia*, a letter, dated December 15, 1977, which informed them of the state "fair lending" law and ordered them to give to potential loan applicants, and to post "in a conspicuous place for public inspection" in their respective offices on and after January 1, 1978, a prescribed "Fair Lending Notice".[7]

The Board thereupon interceded. On February 2, 1978, it issued a legal opinion that the state "fair lending" law was inapplicable to federally chartered savings and loan associations operating in California and, accordingly, that they were not required to post the "Fair Lending Notice" prescribed by the Secretary. (C.T., pp. 106-115.)

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[7] The text of the notice is as follows:

"STATE OF CALIFORNIA
FAIR LENDING NOTICE

TO: ALL APPLICANTS FOR A LOAN FOR THE PURCHASE, CONSTRUCTION, REHABILITATION, IMPROVEMENT OR REFINANCING OF A ONE-TO-FOUR FAMILY RESIDENCE.

UNDER THE HOUSING FINANCIAL DISCRIMINATION ACT OF 1977, IT IS UNLAWFUL FOR A FINANCIAL INSTITUTION TO REFUSE TO MAKE A LOAN OR TO OFFER LESS FAVORABLE TERMS THAN NORMAL (SUCH AS A HIGHER INTEREST RATE, LARGER DOWN PAYMENT OR SHORTER MATURITY) BASED ON ANY OF THE FOLLOWING CONSIDERATIONS:

1. NEIGHBORHOOD CHARACTERISTICS (SUCH AS THE AVERAGE AGE OF THE HOMES OR THE INCOME LEVEL IN THE NEIGHBORHOOD) EXCEPT TO A LIMITED EXTENT NECESSARY TO AVOID AN UNSAFE AND UNSOUND BUSINESS PRACTICE.
2. RACE, SEX, COLOR, RELIGION, MARITAL STATUS, NATIONAL ORIGIN OR ANCESTORY [SIC].

(Footnote continued on following page)

A few days later, on February 6, 1978, the federal associations instituted, against both the Secretary and the Board, the action from which the within purported appeal arises. The relief sought consisted of a declaration that HOLA and regulations promulgated by the Board pursuant thereto preempted the field with respect to the "fair lending" practices of federal savings and loan associations, thereby precluding the application to federal associations of the state "fair lending" law, and appropriate interlocutory and permanent injunctive relief.[8]

(Footnote continued from preceding page)

IT IS ALSO UNLAWFUL TO CONSIDER, IN APPRAISING A RESIDENCE, THE RACIAL, ETHNIC, OR RELIGIOUS COMPOSITIONS OF A PARTICULAR NEIGHBORHOOD, WHETHER OR NOT SUCH COMPOSITION IS UNDERGOING CHANGE OR IS EXPECTED TO UNDERGO CHANGE.

IF YOU WISH TO FILE A COMPLAINT, OR IF YOU HAVE QUESTIONS ABOUT YOUR RIGHTS, CONTACT:

OFFICE OF FAIR LENDING
BUSINESS & TRANSPORTATION AGENCY
1120 N Street
Sacramento, CA 95814

OR CALL *COLLECT*: (916) 322-9851

IF YOU FILE A COMPLAINT, THE LAW REQUIRES THAT YOU RECEIVE A DECISION WITHIN THIRTY (30) DAYS.

I (WE) RECEIVED A COPY OF THIS NOTICE.

_____
Signature of Applicant Date"

[8] The complaint also described, and sought declaratory and injunctive relief with respect to, a dispute between the federal associations, the Secretary and the Board concerning the application of California law to the exercise of "due on" clauses in mortgage loan contracts between federal associations and their borrower-members. That aspect of the complaint was not adjudicated by the District Court until after entry of the judgment from which the instant purported appeal is taken. The District Court has now ruled in favor of the federal associations and the Board, and the Secretary has appealed to the Court of Appeals.

On February 10, 1978, the Board filed an answer and cross-claim in which it admitted essentially all of the material charging allegations of the complaint and, in addition, itself cross-complained against the Secretary for declaratory and injunctive relief. The relief which it sought consisted, *inter alia,* of a declaration that:

> "1. The Board's current regulation and statement of policy, 12 C.F.R. §§528.2 and 531.8 and other federal statutes constitute the exclusive law governing nondiscrimination-in-lending requirements imposed on federal savings and loan associations in California and throughout the country;
>
> "2. In the HOLA, the Congress delegated to the Board exclusive authority to regulate and supervise the lending practices of federal savings and loan associations throughout the country;
>
> "3. The provisions of the Act (Section 35800 through 35833 of the California Health and Safety Code) and present and future regulations of defendant Silberman thereunder, are not applicable to the operations of federally chartered savings and loan associations in California." (C.T., p. 83, lines 12-24.)[9]

Three weeks after the commencement of the action below, on February 28, 1978, the Secretary himself commenced an action in the San Mateo County Superior Court to compel compliance by federal associations with the state "fair lending" law, *People of the State of California, et al. v. West Coast Federal Savings and Loan Association, etc., et al.,* S.M.C.S.C. No. 220012 ("the *West Coast Federal* action"). In it he sought

[9] The cross-claim also described, and sought declaratory relief with respect to, the application of California law to the "due on" practices of federally chartered savings and loan associations. (C.T., p. 81, line 30 to p. 82, line 28.)

to impose upon the named defendant, West Coast Federal Savings and Loan Association, and one hundred "doe" defendants, a penalty of $2,500 for each violation by each association of the order to post and disseminate the "Fair Lending Notice" which he prescribed.[10]

The Board responded by amending its cross-claim against the Secretary to add a count and prayer for temporary interlocutory and permanent injunctive relief restraining the Secretary and "all persons acting in concert with him" from seeking to compel federal savings and loan associations to conform to the state "fair lending" law. (C.T., p. 170, line 15 to p. 172, line 1.)

On March 7, 1978, the federal associations filed a notice of motion and motion for partial summary judgment in which they sought a declaratory judgment that, *inter alia:*

[10] The federal associations submitted to the District Court declarations that the penalties sought by the Secretary against West Coast Federal Savings and Loan Association in the *West Coast Federal* action would alone amount to approximately ten million dollars per annum, more than half of the total net worth of the association; assuming that the "doe" defendants were all other federal associations in California, that the aggregate penalties sought would amount to in excess of nine hundred million dollars per annum, more than half of the total net worth of all federal associations in California; and that imposition of such penalties would effectively destroy the federal savings and loan system in California. (C.T., p. 294, lines 23-31; C.T., p. 392, line 25 to p. 399, line 22.)

In response the Secretary submitted a declaration which did not dispute the accuracy of Appellees' description of the relief sought or the consequences which would ensue from its application but, instead, argued that California law "does not mandate that the court impose a fine of $2,500 per violation" but merely provides for a "civil penalty *not to exceed* two thousand five hundred dollars . . ."; and that "[c]ertainly any state court in applying civil penalty provisions . . . will carefully weigh and consider any mitigating circumstances such as, for example, reliance by a federal savings and loan association on the pronouncements of its regulator". (C.T. p. 370, lines 7-22).

a. The Secretary "has no authority to require that . . . [the federal associations] comply with his order of December 15, 1977 . . ."; and

b. The Secretary "may not require . . . [the federal associations] to report on his forms, or keep records in the manner prescribed by him, as to nondiscrimination in their lending operations" or "to give notice to their borrowing-members and prospective borrowing-members to address their complaints about non-discrimination in lending practices . . ." to the Secretary or "to request such information as to their rights" from the Secretary. (C.T., p. 90, line 11 to p. 91, line 11.)

In response, on March 13, 1978, the Secretary moved to dismiss the action on the ground, *inter alia,* that the complaint and cross-claim each failed to state a claim upon which relief could be granted. (C.T., pp. 174-184.)

The District Court heard the respective motions, took them under submission, and on May 10, 1978, announced its intended decision.

In its statement of intended decision, the District Court explained, *inter alia,* that the Board's "exercise of its plenary regulatory power [12 U.S.C. 1464(a)] . . . 'to provide for the organization, incorporation, examination, operation and regulation . . . '" of federally chartered savings and loan associations "preempts legislation by the State of California which attempts to subject federally chartered savings and loans to state regulation and discipline in the area of anti-redlining practices" and that "[l]anguage contained in the Equal Credit Opportunity Act, 15 U.S.C. §1691 *et seq.,* and in the Home Mortgage Disclosure Act of 1975, 12 U.S.C. §§2801-2809, in no way limits the Federal Home Bank's plenary regulatory power under the Home Owners' Loan Act of 1933, 12 U.S.C. §1461 et seq." ("Jurisdictional Statement", App., pp. 11-15.)[11]

[11] Also before the District Court was a motion by the Board for a preliminary injunction against the Secretary and persons acting in concert with him "enforcing, or seeking to enforce, the provisions

(Footnote continued on following page)

Based upon the foregoing statement of intended decision, the District Court entered the order denying the motion to dismiss and the order granting partial summary judgment and directed the entry of a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. ("Jurisdictional Statement", App., pp. 16-23.) The Secretary appealed from such orders to the Court of Appeals. (*Id.,* p. 80.)

C. *The Judgment of the Court of Appeals*

The Court of Appeals declined to pass upon the question of whether those aspects of the state "fair lending" law which purported to confer substantive rights upon borrowers were preempted, explaining that "[n]o dispute presently exists as to" that issue and that "[w]e are not faced with a suit by a borrower against a federal association charging violation of a substantive state regulation". ("Jurisdictional Statement", App., p. 9.)

Rather, the Court of Appeals confined itself to the question of whether the Secretary could lawfully apply "the procedural aspects" of the state "fair lending" law to federal associations

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of . . . [the state 'fair lending' law], or provisions of regulations issued or promulgated thereunder, against any federally chartered saving and loan association or associations, or from assessing or attempting to assess a penalty on such federal associations for any alleged noncompliance with the Act during the period from February 6, 1978—when this action was originally filed—until final judgment is rendered". (C.T., p. 224, lines 8-17.) With respect to such motion the District Court explained that while it could "be granted under the authority of *NLRB* v. *Nash-Finch Company,* 404 U.S. 138, 144 (1941) and its progeny, such an order would appear to be unnecessary in the light of this Court's ruling on plaintiff's motion for partial summary judgment . . ."; but that "should circumstances arise where such an injunction might be necessary in aid of this Court's jurisdiction or to protect and effectuate its judgments . . . the Court would entertain a renewal of the motion". (C.T., p. 1100, line 22 to p. 1101, line 2.)

since "[i]t is the regulatory authority of appellant [the Secretary] over the federal associations in these respects that is here in dispute".[12] Concluding that the answer to this question was in the negative, the Court of Appeals affirmed the judgment of the District Court, explaining:

> "*In our judgment the regulatory control of the Bank Board over federal savings and loan associations is so pervasive as to leave no room for state regulatory control.* As this court noted in *Meyers v. Beverly Hills Federal Savings & Loan Ass'n,* 499 F.2d 1145, 1147 (9th Cir. 1974):
>
> > 'Pursuant to its valid statutory authority, the Federal Home Loan Bank Board has promulgated comprehensive regulations covering all aspects of every federal savings and loan association "from its cradle to its corporate grave". *People of State of California v. Coast Federal Savings and Loan Ass'n,* S.D. Ca. 1951, 98 F.Supp. 311, 316.'

[12] In his Jurisdictional Statement the Secretary purports to find the distinction drawn by the Court of Appeals between the substantive and procedural aspects of the state fair lending law "inexplicable" ("Jurisdictional Statement," p. 6, n. 2). Yet the Secretary, expressly recognizes—and indeed relies upon—that distinction in his opening brief in *Glendale Federal Savings and Loan Association v. Fox, etc.,* Ninth Circuit No. 79-3573, p. 52, an appeal in which the Secretary is represented by the same counsel that represents the Secretary in the case at bar:

> "The instant case presents an issue left open by this court in *Conference of Federal Sav. & Loan Ass'n v. Stein,* 604 F.2d 1256 (9th Cir. 1979). In that case, the court held that state procedural regulations applicable to federal associations were preempted. The court, however, expressly declined to reach the issue of whether substantive rights of citizens conferred by state law were preempted. We deal here with the substantive rights of state citizens under state law. Thus, *Conference* is inapplicable."

> "*The broad regulatory authority over the federal associations conferred upon the Bank Board by HOLA does wholly pre-empt the field of regulatory control over these associations.* If state-conferred rights are to be enforced against the federal associations by any regulatory body (a question we do not reach), enforcement must be by the Bank Board." ("Jurisdictional Statement", App., pp. 9-10; emphasis added.)[13]

It is from the judgment of the Court of Appeals that the Secretary prosecutes the instant purported appeal.

IV

ARGUMENT

A. *The Judgment Of The Court Of Appeals Did Not Hold A California Statute Invalid, As Required By 28 U.S.C. §1254(2).*

As set forth in §I, *supra,* 28 U.S.C. §1254(2) provides, in pertinent part, that "[c]ases in the courts of appeals may be reviewed by the Supreme Court . . . [b]y appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . ." In the instant case the Secretary argues that the judgment of the Court of Appeals held that the state "fair lending" law was invalid insofar as it applied to federal associations and, therefore, that this Court has jurisdiction over its appeal pursuant to §1254(2). ("Jurisdictional Statement", p.3.)

[13] The Comptroller of the Currency had previously advised the Governor or the State of California, in a letter dated June 19, 1978, that while "the substantive nondiscrimination provisions contained in . . . [the state 'fair lending' law] apply to national banks . . . the state's enforcement mechanism and complaint resolution process are pre-empted in the case of national banks by the Comptroller's

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Perhaps because of the infrequency with which it has been invoked as a basis for Supreme Court appellate jurisdiction, there is a paucity of reported cases that address the question of what constitutes a judgment of a court of appeals holding a state statute invalid for purposes of §1254(2). Nevertheless, based upon an analysis of whatever case law exists, the federal associations believe that there is at least a serious question as to whether a court of appeals judgment constitutes such a holding when it merely determines that federal law would preempt the application of a state statute without reaching the question of whether the state statute was actually intended to apply in the premises.

In the only case law authority cited by the Secretary in this regard, *Minnesota v. Northern States Power Co.*, 405 U.S. 1035 (1972), *aff'g* 447 F.2d 1143 (8th Cir. 1971), appellate jurisdiction was not contested and thus the issue of whether the judgment satisfied the requirements of §1254(2) in light of its failure to expressly hold that state law was intended to apply was never explicitly addressed by this Court.

Moreover, several recent decisions of this Court, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), reh'g den., 431 U.S. 925 (1977), and *Minnesota, etc. v. Clifford L. Alexander, Secretary of the Army, et al.*, 430 U.S. 977 (1977), suggest that in order for this Court to have jurisdiction under 28 U.S.C. §1254(2),

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congressionally-mandated regulatory and supervisory responsibilities"; and, in response, the State of California agreed that the enforcement mechanism and complaint resolution process provided for in the state "fair lending" law would not be applied to national banks—this despite the enormous involvement of national banks (such as Bank of America National Trust and Savings Association) in residential mortgage lending activities. ("REPLY TO AMICUS CURIAE BRIEF" in Court of Appeals, Exhibits "A" and "B".) Thus the effect of the Court of Appeals' decision was merely to create a parity between federal associations and national banks vis-a-vis the procedural aspects of the state "fair lending" law.

the judgment of the court of appeals must determine that the state law was intended to apply in the premises and that a determination that state law could not apply because federal law would preempt such application is not, in and of itself, sufficient.

In *Rath Packing Co. v. Becker*, 530 F.2d 1295 (9th Cir. 1975), the Court of Appeals held that a federal statute, the Wholesome Meat Act of 1967, 21 U.S.C. §601 *et seq.*, preempted, with respect to a corporation engaged in interstate commerce, application of a California statute, California Business and Professions Code §17500 *et seq.*; but it did not expressly reach the question of whether the state law was intended to apply in the premises (although such an intention appears to have been assumed) and therefore did not determine that the state law was invalid. The judgment of the Court of Appeals was reviewed on a writ of certiorari and affirmed, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

An appeal, of course, entitles a party to Supreme Court review as a matter of right, whereas a petition for review by writ of certiorari does not. (Rule 19, Rules of the United States Supreme Court.) Hence had the judgment of the Court of Appeals invalidated a state statute within the meaning of 28 U.S.C. §1254(2), why would the losing party have sought review by writ of certiorari rather than appeal? The answer, presumably, is that the losing party — an officer of the State of California represented by the Attorney General of the State of California — did not believe that the judgment of the Court of Appeals was one which invalidated a state statute and thus came within the ambit of §1254(2).

Even more compelling, in *State of Minn., by Spannaus v. Hoffman*, 543 F.2d 1198 (8th Cir. 1976), the State of Minnesota, acting through its Attorney General and its Pollution Control Agency, brought an action against the Secretary of the Army and the Army Corps of Engineers, seeking a declaration that the Federal Water Pollution Control Act Amendments of 1972,

33 U.S.C. §1251 *et seq.* "'grants to Minnesota authority to require defendants to comply with state pollution abatement requirements including obtaining a state discharge permit'". The United States District Court for the Eastern District of Minnesota found in favor of the plaintiffs and the defendants appealed to the United States Court of Appeals for the Eighth Circuit.

The Court of Appeals, without expressly reaching the question of whether Minnesota law was intended to apply in the premises (although it appeared to assume that such application was intended), concluded that the Federal Water Pollution Control Act of 1972 did not subject the Army Corps of Engineers to state water pollution laws with respect to operations conducted in navigable waters; and, accordingly, it reversed the judgment of the District Court, explaining:

> "In light of the principles we have discussed, the Supremacy Clause, the legislative history of the [Federal Water Pollution Control] Act, as well as its internal structure, we find with respect to the disposal of dredged material by the Corps, that there is insufficient evidence to meet the clear and unequivocal standard for finding Congressional authorization for state regulation . . . Regulation by the various States of the Union, each with its own requirements, could result in a conceivably chaotic situation as riverborne traffic moved from the boundaries of one state to those of another. We find no authorization of such state regulation in the legislative history of the Act or its several sections. We hold that the Congress did not intend a subordination of the federal power and authority in this area to State control." (543 F.2d 1209.)

The plaintiffs purported to appeal to this Court pursuant to 28 U.S.C. §1254(2). This Court, however, dismissed the appeal "for want of jurisdiction". *Minnesota, etc. v. Clifford L. Alexander, Secretary of the Army, et al.*, 430 U.S. 977 (1977). Moreover, in a dissenting opinion Justice Stevens, joined by Justices Marshall and Rehnquist, observed:

> "Our mandatory jurisdiction includes cases in which a Court of Appeals holds a state statute 'invalid as repugnant to the Constitution, treaties or laws of the United States . . .' 28 U.S.C. §1254(2). The Secretary of the Army concedes that '[b]y holding that the federal statute did not waive the traditional immunity of the Corps of Engineers from state regulation, the court implicitly held that the purported reach of state laws over the Corps' dredging activities was invalid under the Supremacy Clause . . .'
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> . . . In *City of Detroit v. Murray Corp.*, 355 U.S. 489 . . . the Court of Appeals . . . had ruled that, as applied, a state taxing statute invaded the Federal Government's immunity from state taxation. This Court postponed the question of appellate jurisdiction to the hearing on the merits, but then held without explanation that an appeal was proper. . . . A similar result should apply to a holding that a state statute invaded the Federal Government's immunity from unconsented state regulation. *It is arguable, of course, that our mandatory appellate jurisdiction is defeated by the Court of Appeals' failure to make express its invalidation of the statute as applied to the Corps . . .*" (430 U.S. 978, n. 1; emphasis added.)

The judgment of the Court of Appeals in the instant case and the judgment of the Court of Appeals in *State of Minnesota* are "on all fours" in respects here material. The judgment of the Court of Appeals in the instant case failed to reach the question of whether the California "fair lending" law was intended to apply to federal associations; the judgment of the Court of Appeals in *State of Minnesota* failed to reach the question of whether the Minnesota water pollution laws were intended to apply to the Army Corps of Engineers; the judgment of the Court of Appeals in the instant case determined

that under the supremacy doctrine of the United States Constitution the states were precluded from exercising regulatory control over federal savings and loan associations with respect to their lending practices; and the judgment of the Court of Appeals in *State of Minnesota* determined that the states were precluded from exercising regulatory control over the Army Corps of Engineers with respect to its operations in navigable waters. Hence if the judgment of the Court of Appeals in *State of Minnesota* did not present a judgment which declared a state statute invalid under federal law within the meaning of 28 U.S.C. §1254(2), neither does the judgment of the Court of Appeals in the instant case.

In point of fact, and while the District Court did find such intent ("Jurisdictional Statement", App., p. 20), there is, at the least, substantial doubt that the state "fair lending" law actually was intended to apply to federal associations.

First, while the state "fair lending" law does not expressly provide that it does *not* apply to federal associations, neither does it expressly provide that it *does* so apply.

Second, under California law it may be presumed, for purposes of legislative interpretation, that a term used in a statute was intended to have the same meaning as that accorded to it in other statutes with which it is in *pari materia.* (See, e.g., *In re Phyle,* 30 Cal.2d 838, 845 (1947); *In re Marriage of Pinto,* 28 Cal.App.3d 86, 89 (1972); see also *Marks v. United States,* 161 U.S. 297, 304 (1896).) Here the state "fair lending" law employs the term "savings and loan association" without defining it; yet another California statute which deals with the regulation of savings and loan associations and with which the state "fair lending" law is, therefore, presumably in *pari materia* defines the term "savings and loan association" as *not* including federal savings and loan associations. (California Financial Code §5057; see also California Financial Code §9257.)

Third, under California law it is presumed that a legislative body acts with knowledge of, and in light of, existing laws and judicial decisions. See, e.g., *Estate of McDill,* 14 Cal.3d 831, 839 (1975). Moreover, "it should not 'be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication'". *Theodor v. Superior Court,* 8 Cal.3d 77, 92 (1972). Here the California legislature enacted the state "fair lending" law against the background of an overwhelming body of case law to the effect that the states do not have authority to regulate the operations of federal associations. (See §IV B.1., *infra.) Indeed, the chief legal officer of California (and counsel for the Secretary here) had previously repudiated as unconstitutional an effort by the legislature, through the enactment of Financial Code §11500, to exercise such authority. In light of the foregoing, had the legislature intended in enacting the state "fair lending" law to once again attempt to assert dominion over federal associations, is it not reasonable to assume that the intention would have been clearly manifested through an express declaration to that effect rather than left to doubtful inference?*

B. *The Purported Appeal Of The Secretary From The Judgment Of The Court Of Appeals Does Not Present A Question Which Is Sufficiently Substantial To Warrant Further Argument And, Accordingly, The Judgment of The Court Of Appeals Should Be Summarily Affirmed.*

As set forth in §IV A., *supra,* it is the position of the federal associations that the judgment of the Court of Appeals failed to hold the state "fair lending" law invalid and, accordingly, is not subject to appeal to this Court pursuant to 28 U.S.C. §1254(2). Even assuming *arguendo,* however, that the judgment *did* hold the state "fair lending" law invalid, nonetheless in order for this Court to entertain an appeal it must present a question which is sufficiently substantial to warrant further argument. Rule 15(1)(e) and (f), Rules of the United States Supreme Court; *Zucht v. King,* 260 U.S. 174, 176 (1922). Here the judgment of

the Court of Appeals to the effect that federal law precludes the Secretary from imposing upon federal associations the procedural requirements of the state "fair lending" law is so clearly correct that no such question is presented and, therefore, the judgment of the Court of Appeals should be summarily affirmed.[14]

1. **Federal Preemption Of A Mortgage Lending Practice Of Federal Associations With Respect To Which The Board Has Promulgated A Specific Regulation Pursuant To HOLA Is Well Settled.**

HOLA and the regulations promulgated thereunder probably preempt the field with respect to all mortgage lending practices of federally chartered savings and loan associations, whether or not there is a specific regulation on point, and they indisputably do so with respect to any matter as to which there is such a specific regulation.[15] See, e.g.:

First Fed. S. & L., Boston v. Greenwald, 591 F.2d 417, 425 (1st Cir. 1979);

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[14] Since this is a motion to dismiss or affirm rather than a brief on the merits of the controversy, the federal associations will present here only an abbreviated discussion of the applicable law. For a more comprehensive discussion, including the operation of the supremacy clause of the Constitution, Art. VI, cl. 2, and the legislative history of HOLA, see the "BRIEF FOR PLAINTIFFS-APPELLEES" in the Court of Appeals, pp. 36-70.

[15] It is the position of the federal associations that the promulgation by the Board, pursuant to the authority conferred upon it by § 5(a) of HOLA (12 U.S.C. §1464(a)), of comprehensive regulations governing the operation of federally chartered savings and loan associations effected a preemption of the "fair lending" practices of such associations and would have done so even in the absence of a specific regulation on point. (Indeed, it is the position of the federal associations that the enactment of HOLA itself effected such preemption.) Be that as it may, however, whether or not there would be federal preemption in absence of a specific Board regulation is a question that is not presented, and therefore need not be reached, in the within appeal.

Kupiec v. Republic Federal Savings & Loan Ass'n, 512 F.2d 147, 150 (7th Cir. 1975);

Meyers v. Beverly Hills Federal Savings & Loan Ass'n, 499 F.2d 1145, 1147 (9th Cir. 1974);

Central S. & L. Ass'n of Chariton, Iowa v. Federal H. L. B. Bd., 422 F.2d 504, 507 (8th Cir. 1970);

Murphy v. Colonial Federal Savings and Loan Association, 388 F.2d 609, 611 (2nd Cir. 1967);

North Arlington Nat. Bank v. Kearney Fed. Sav. & L. Ass'n, 187 F.2d 564, 565-566 (3rd Cir. 1951), *cert. den.,* 342 U.S. 816 (1951);

Bailey v. First Federal S & L Ass'n of Ottawa, 467 F.Supp. 1139, 1141 (C.D. Ill. 1979);

Glendale Fed. Sav. & Loan Ass'n v. Fox, 459 F.Supp. 903, 905 (C.D. Cal. 1978);

City Federal Savings & Loan Ass'n v. Crowley, 393 F.Supp. 644, 655 (E.D. Wis. 1975);

Lyons Savings & Loan Ass'n v. Federal Home Loan Bank Bd., 377 F. Supp. 11, 17-18 (N.D. Ill. 1974);

People, etc. v. Coast Federal Sav. & Loan Ass'n, 98 F.Supp. 311, 318-320 (S.D. Cal. 1951);

Madsen v. Prudential Federal Savings & Loan Ass'n, U.S.D.C., Utah, Civil No. 77-0350;

Nalore, et al. v. San Diego Federal Sav. & Loan Ass'n, U.S.D.C., S.D. Cal., Civil No. CV 77-0660-N;

Derenco, Inc. v. Benj. Franklin Fed. Sav. and Loan Ass'n, 281 Or. 533, 577 P.2d 477, 495-496 (1978), *cert. den.,* 439 U.S. 1051 (1978);

Kaski v. First Fed. S & L Ass'n of Madison, 72 Wis.2d 132, 240 N.W.2d 367, 372 (Wis. 1976);

Washington Fed. S. & L. Ass'n v. Balaban, 281 So.2d 15, 16-17 (Fla. 1973);

Springfield Institution v. Worcester Fed. S. & L. Ass'n, 329 Mass. 184, 107 N.E.2d 315, 317-318, *cert. den.,* 344 U.S. 884 (1952).[16]

An early and leading case on the issue of exclusive federal regulation of federally chartered savings and loan associations is *People, etc. v. Coast Federal Sav. and Loan Ass'n,* 98 F.Supp. 311 (S.D. Cal. 1951). In *People v. Coast Federal,* an action which was originally commenced in a California state court and removed to federal District Court, the People of the State of California and the then California Superintendent of Banks sought an injunction and the recovery of statutory penalties against a federal savings and loan association (one of the parties to the within appeal) on the ground that "through signs and other means of advertising, defendant [the federal association] has transacted business in the manner of a bank and has held itself out as a bank or savings bank, and has led the public to believe that it was such a bank, without authority and in violation of state statutes." (98 F.Supp. 315.)

The District Court dismissed the HOLA system of federal savings and loan associations, that the federal regulatory agency charged with responsibility for supervising them had prescribed its own regulation to control advertising practices of federal associations, and that therefore the state banking laws on the subject of advertising were inapplicable to federal savings and loan associations operating within the state:

> "Not only does the act of Congress [Home Owners' Loan Act of 1933] which authorized the creation, operation and supervision of federal savings and loan associations by the Home Loan Bank Board, embrace the entire field, but

[16] Indeed, just two years ago, the Court itself, in *First Federal Savings and Loan Ass'n* v. *Massachusetts Tax Com'n,* 437 U.S. 255, 258 n. 3 (1978), expressly recognized that HOLA "protects federal associations from being forced into the state regulatory mold."

> the comprehensive rules and regulations adopted by the Board clearly meet the test of covering the subject matter of the [state] statute. . . . It seems clear that Congress has preempted the field, making invalid the state statutes plaintiffs rely upon . . . when attempted to be invoked against a Federal savings and loan association. U.S. Constitution Art. VI, cl. 2. . .
>
> * * *
>
> ". . . The congressional mandate for uniformity would be destroyed if these associations were subject to federal control, plus concurrent state control, which latter control might vary in every one of the forty-eight states.
>
> * * *
>
> "Since the statutes upon which the complaint is based are invalid as applied to this defendant, a federal instrumentality, the complaint fails to state a claim upon which relief may be granted. . . ." (98 F.Supp. 318-320.)[17]

[17] The People of the State of California and the Superintendent of Banks of the State of California appealed to the United States Court of Appeals for the Ninth Circuit from the decision of the District Court, then moved to dismiss the appeal on the ground that the defendant, Coast Federal Savings and Loan Association, had discontinued the practices complained of in the action and thus rendered the appeal moot. The Court, in an order by Circuit Judges William Derman, Albert Lee Stephens and Walter L. Pope, did grant the motion to dismiss. In doing so, however, it expressly rejected the representation of the People of the State of California and the Superintendent of Banks that Coast Federal Savings and Loan Association had discontinued the practices of which they had complained and strongly implied that it regarded the holding of the District court as correct:

"The appellants move to dismiss their appeal. In the motion they make the statement that the appellee has discontinued and is not now committing the acts complained of in the complaint. There is

(Footnote continued on following page)

Another leading case on the issue of federal preemption is *Meyers v. Beverly Hills Federal Savings and Loan Ass'n,* 499 F.2d 1145 (9th Cir. 1974). There the plaintiffs brought an action in the state court against, *inter alia,* eight federally chartered savings and loan associations in California challenging the legality of provisions of their mortgage loan contracts authorizing them to assess charges in the event that the principal of a loan was repaid prior to maturity. After the action was removed, the District Court dismissed the action as against the federally chartered associations on the ground that federal law had preempted the field, and the plaintiffs appealed. (See 499 F.2d 1146.)

The United States Court of Appeals for the Ninth Circuit, after reviewing the doctrine of federal preemption, reaffirmed the holding of *People v. Coast Federal, supra,* that federal law had preempted the regulation of federally chartered savings and loan associations by reason of the Federal Home Loan Bank Board's promulgation of comprehensive regulations covering all aspects of their operations and sustained the judgment of dismissal, explaining:

> ". . . All of the appellee federal savings and loan associations operate and are organized and chartered under the Home Owner's Loan Act of 1933, 12 U.S.C. §1461 et seq. This Act established the Federal Home Loan Bank Board, which 'is authorized, under such rules and regulations as it may prescribe, to provide for the organization,

(Footnote continued from preceding page)

nothing in the record from which it appears that the appellee has discontinued any of the acts complained of in the complaint. On this matter it appears that the district court held that 'No evidence was offered which would support a finding that defendant (appellee) was actually transacting its business other than strictly within the limited perimeter of its expressly authorized field.'

"Appellants' motion to dismiss their appeal is granted, with costs against appellants." (Order in 9th Cir. No. 13119, filed June 3, 1952.)

> incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor. . . .' 12 U.S.C. §1464(a).
>
> "Pursuant to its valid statutory authority, the Federal Home Loan Bank Board has promulgated comprehensive regulations covering all aspects of every federal savings and loan association 'from its cradle to its corporate grave' " (499 F.2d 1146-1147.)[18]

Similarly in *Lyons Savings & Loan Ass'n v. Federal Home Loan Bank Bd.,* 377 F.Supp. 11 (N.D. Ill. 1974), an Illinois state chartered savings and loan association brought an action against two federally chartered savings and loan associations and the Federal Home Loan Bank Board, contending, *inter alia,* that federally chartered associations were subject to Illinois State prohibitions against branching. The District Court rejected this contention on the ground of federal preemption, stating:

> ". . . *courts have upheld the authority of the Board on the basis that the plenary powers given to the Board in the HOLA clearly evidence a Congressional intention to preempt the field, thus precluding any regulation of federal associations by state law.*

[18] With respect to the specific area of controversy, prepayment charges on mortgage loan contracts, the Court of Appeals observed:

> "Section [12 C.F.R. §] 545.6-12(b) [specifically covering the area of prepayment charges] represents a valid exercise of the Federal Home Loan Bank Board's delegated power, and we therefore hold *that federal law preempts the field of prepayment of real estate loans to federally chartered savings and loan associations, so that any California law in the area is inapplicable to federal savings and loan associations operating within California.* (Id., p. 1147; emphasis added.)

* * *

"[U]nlike the National Bank Act which ties branching policies of national banks directly into each state's laws, *the HOLA directs the Board to give 'primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States' . . . the courts have construed this language as vesting discretion in the Board to determine first, what the 'best practices' are, and second, to implement them on a nationally uniform basis.* The fact that any particular state has not adopted for its own institutions what the Board deems to be a 'best practice' cannot limit the Board's authority without undermining this fundamental purpose of the statute." (377 F.Supp. 17-18; emphasis added.)

In *Kaski v. First Fed. S & L Ass'n of Madison, 72 Wis.2d 132,* 240 N.W.2d 367 (Wis. 1976), the named plaintiffs had brought a purported class action against a federally chartered savings and loan association predicated upon the contention that a provision in the mortgage loan contracts between the association and its borrowers under which the association was authorized to increase the interest rate on the loans was invalid under state law. The trial judge had ruled that the clause in question was proper under state law. On appeal, however, the Wisconsin Supreme Court reversed, holding that federal law had preempted regulation of the investment and lending practices of federally chartered savings and loan associations, and Wisconsin State law was therefore inapplicable:

"... it is apparent that Congress has substantially occupied the field in regard to the regulation of federal savings and loan associations, particularly in the area of the regulation of lending practices. This scheme of federal regulation is pervasive. Moreover, it has long been held that the establishment of a federal system of banking or of lending is of such importance in our national life that, for the most

part, state laws should not be allowed to interfere. *McCulloch v. Maryland* (1819), 17 U.S. (4 Wheaton) 316, 4 L.Ed. 579. It is apparent that the Congress considered that the regulation of lending procedures of federal institutions was one that required national and uniform regulation." (240 N.W.2d 372)

Most recently, in *First Fed. S. & L., Boston v. Greenwald,* 591 F.2d 417, 425 (1st Cir. 1979), all of the federal savings and loan associations in Massachusetts sought a judicial declaration that they were not subject to a Massachusetts statute requiring, *inter alia,* the payment of interest on escrowed funds. The United States District Court for Massachusetts granted a summary judgment holding that federal law preempted the Massachusetts statute and the United States Court of Appeals for the First Circuit affirmed, explaining:

"The Home Owners' Loan Act grants to the Bank Board broad regulatory authority over the operation of federal savings and loan associations. ... Pursuant to this authority, the Bank Board has issued detailed regulations governing the 'operations of every Federal savings and loan association from its cradle to its corporate grave.' [Citations.] One such regulation is 12 C.F.R. § 545.6-11(c), which specifies the conditions under which the federal associations must pay interest on escrow accounts." (591 F.2d 425.)

Do any of the cases cited by the Secretary ("Jurisdictional Statement", p. 30, footnote 21) support the conclusion that HOLA and the regulations promulgated thereunder do not preempt the mortgage lending practices of federal associations when, as here, the Board has promulgated a specific regulation on point? Clearly they do not.

1. *Federal National Mortgage Ass'n v. Lefkowitz,* 390 F.2d 1364, 1368-1370 (S.D.N.Y. 1975) *did* find a state statute applicable; but it found the statute applicable not to a *federal savings*

and loan association but, rather, to another type of federally chartered institution, the Federal National Mortgage Association; and whereas HOLA invests the Board with plenary authority over federal associations (12 U.S.C. §1464(a)), no federal agency or official is vested with comparable authority over the Federal National Mortgage Association (see 12 U.S.C. § 1723a(h))).[19]

2. *Beverly Hills Fed. S. & L. Ass'n v. Federal Home L Bk. Bd.*, 371 F.Supp. 306, 313 (C.D. Cal. 1973), explicitly recognized "the exclusivity of federal regulation over federally chartered savings and loan associations" and held only that federal law "does not preclude the federal regulatory agency itself [the Board] from adopting or imposing standards derived from state or general common law principles to effectuate policies implicit in" HOLA. In the instant case, of course, not only has the Board failed to impose state "fair lending" laws, it has explicitly stated that federal associations were to be governed by the Board's own "fair lending" regulations exclusively.

[19] The Secretary's attempt to imply the contrary notwithstanding, federal law does not preempt regulation of other federally chartered financial institutions, such as national banking associations, nearly as comprehensively as it preempts regulation of federal savings and loan associations. As explained in the seminal decision of *People, etc. v. Coast Federal Sav. & Loan Ass'n*, 98 F.Supp. 311 (S.D. Cal. 1951), itself quoting an earlier decision:

> "'. . . a building and loan association organized under the Home Owners' Loan Act is not a national bank and the powers and duties of the two materially differ.' *As to national banks, Congress expressly left open a field for state regulation and the application of state laws; but as to federal savings and loan associations, Congress made plenary, preemptive delegation to the Board to organize, incorporate, supervise and regulate, leaving no field for state supervision.*" (98 F.Supp. 319; emphasis added.)

See also:

North Arlington Nat. Bank v. Kearney Fed. Sav. & L. Ass'n., 187 F.2d 564, 567 (3rd Cir. 1951), *cert. den.*, 342 U.S. 816 (1951));

Lyons Savings & Loan Ass'n. v. Federal Home Loan Bank Bd., 377 F.Supp. 11, 20-21 (N.D. Ill. 1974).

3. *Durnin v. Allentown Federal Savings and Loan Ass'n.*, 218 F.Supp. 716, 720-21 (E.D.Pa. 1963), merely held that in the *absence* of a Board regulation on the point, "the general 'common law' right of a member of a corporation to inspect and copy the membership list" (218 F.Supp. 719) would obtain. In the instant case, of course, there *are* specific regulations on point. Furthermore, in a later case, *Murphy v. Colonial Savings and Loan Association*, 388 F.2d 609, 611 (2nd Cir. 1967), the United States Court of Appeals for the Second Circuit refused to follow *Durnin*, holding that "[s]uch an issue [whether there is a right of access to the membership list of a federal association], which requires a fleshing out of the Board's regulations, is one of federal law." (388 F.2d 611).

4. *Garrett v. Coast & Southern Fed. Sav. & Loan Ass'n*, 9 Cal.3d 731 (1973), did not even consider the question of federal preemption and hence can hardly be regarded as a case which, to use the Secretary's terminology, "found no preemption".[20]

5. *Larwood Co. v. San Diego Fed. S. & L. Ass'n.*, 185 Cal.App.2d 450, 454-455 (1960), dealt not with the question of whether federal law *preempted* the application of state law but, rather, whether state courts have *jurisdiction* over federal associations. (Neither the Board nor the Secretary take the position that state courts lack jurisdiction over federal associations; and obviously any contention that they do would be untenable.)

6. *Pearson v. First Federal Savings and Loan Ass'n.*, 149 So.2d 891, 895-86 (Fla. App. 1963), like *Durnin*, merely held that since there were no Board regulations on point, "this subject [the validity of voting proxies] was left to the prevailing law in the various state jurisdictions . . ." Again, in this case there *are* Board regulations on point; and, furthermore, the holding in *Pearson* is contrary to *Murphy v. Colonial Federal Savings and Loan Association, supra.*

[20] Under California law, a decision does not constitute precedential authority on points not expressly considered in the opinion. See, e.g., *Worthley* v. *Worthley*, 44 Cal.2d 465, 471-472 (1955).

7. *First Federal Savings & L. Ass'n v. Norwood Realty Co.*, 212 Ga. 524, 93 S.E.2d 763 (1956) *did* hold that a federal savings and loan association was subject to a state usury statute; but it did so on the ground that federal law, including a provision of HOLA itself, subjected federal associations to state usury limitations.[21] Here no such federal statute exists. (See §IV B.2., *Infra.*)

8. *Derenco, Inc. v. Benj. Franklin Fed. Sav. and Loan Ass'n*, 281 Or. 533, 577 P.2d 477 (1978), *cert. den.*, 439 U.S. 1051 (1978), held only that federal law did not preempt state laws concerning the payment of interest on escrowed funds *prior to the promulgation by the Board* of a specific regulation on point. Here, of course, there *are* specific Board regulations dealing with the "fair lending" practices of federal associations, and, again, the Board has expressly stated that they are to be exclusive. Moreover, the Secretary's citation is misleading because *Derenco* recognized that once the Board did promulgate a regulation pursuant to HOLA, it preempted state law. (577 P.2d 495-496).

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[21] In particular, the Court reasoned that under 12 U.S.C. § 1464(f) "[a] federal savings and loan association, upon its incorporation automatically becomes a member of the Federal Home Loan Bank of the district in which it is located"; and under 12 U.S.C. § 1425 "[n]o federal savings and loan association shall be retained in such membership if the combined total of the amounts paid to it for interest, commission, bonus, discount, premium, and other similar charges, less a proper deduction for all dividends, refunds, and cash credits of all kinds, creates an actual net cost to the home owner in excess of the maximum legal rate of interest or in case there is a lawful contract rate of interest applicable to such transactions, in excess of such rate (regardless of any exemption from usury laws), or, in case there is no legal rate of interest or lawful contract rate of interest applicable to such transactions, in excess of 8% per annum in the state where such property is located." (93 S.E.2d 767-768.)

In short, while there is an overwhelming body of case authority that HOLA and the regulations promulgated thereunder preempt the application of state law to the mortgage lending practices of federal associations, at least when there is a specific regulation on point, *the Secretary is unable to cite a single case from any state or federal jurisdiction which holds to the contrary.*

Since HOLA and the regulations promulgated thereunder preempt state laws concerning the mortgage lending practices of federal associations when the Board has promulgated a specific regulation on point, and since the "fair lending" practices of federal associations are an aspect of the mortgage lending practices of federal associations with respect to which the Board *has* promulgated regulations, it is obvious that HOLA and the regulation promulgated thereunder would preempt the state "fair lending" law unless the plenary delegation of authority to the Board over federal associations has been subsequently abridged by some other federal statute. As the federal associations shall demonstrate in §IV B.2., *infra,* no such abridgment exists.

2. The Contention That Federal Legislation Authorizes The State To Regulate The "Fair Lending" Practices Of Federal Associations Is Patently Spurious.

a. *The Effect Of The Equal Credit Opportunity Act*

A principal — and probably *the* principal — argument advanced by the Secretary in his attack upon the judgment of the Court of Appeals is that the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §1691 *et seq.*, subjects federally chartered savings and loan associations to the state "fair lending" law. What he appears to be saying, in essence, is that a provision of the Act, 15 U.S.C. §1691d(f), which states, in pertinent part, that

"[t]his subchapter [ECOA] does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter, from complying with, the laws of any State with respect to credit discrimination, except to the extent that those laws are inconsistent with any provision of this subchapter . . .", was intended to subject federal association to the application of certain state consumer protection laws, including the state "fair lending" law. ("Jurisdictional Statement", pp. 16-20.)

Let's consider the argument.

First of all, the basic criterion for determining legislative intent is the language of the statute. *Department & Specialty Store Emp. Union v. Brown,* 284 F.2d 619, 627 (9th Cir. 1961); *Future Farmers of America v. Romack,* 114 F.Supp. 796, 800 (E.D. Ill. 1953), *aff'd.* 211 F.2d 925 (7th Cir. 1954).

Here the language of 15 U.S.C. §1691d(f) does not, as the Secretary seems to assume, purport to apply to federal associations (or anyone else, for that matter) state laws that would not otherwise be applicable to them. Rather, it simply negates an implied preemption that might otherwise arise from the enactment of the ECOA by providing that the ECOA *itself* "does not annul, alter, or affect, or exempt [anyone from complying with]", state law (except to the extent that state and federal law are inconsistent).[22]

The Secretary's characterization of the legislative history of ECOA as manifesting a legislative intent that the states should be permitted to legislate on the subject of "fair lending" is misleading. While it may be true that Congress did not by enacting ECOA intend to *deprive* states of the power to legislate with respect to the subject of "fair lending", *nothing in the legislative history cited by the Secretary could reasonably be read to suggest that ECOA was intended to create a power to legislate which could not otherwise exist.*

[22] The federal associations, of course, do not take the position that state law is inapplicable to them because of ECOA.

Moreover, statutes which contain similar language and are designed to serve a purpose should be interpreted *pari passu. Northcross v. Board of Ed. of Memphis City Schools,* 412 U.S. 427, 428 (1973). Hence, assuming *arguendo* and contrary to fact that §1691d(f) was ambiguous in respects here material, obviously the judicial interpretation, and legislative history, of statutes which are cognates of §1691d(f) would be relevant to its interpretation. Yet an examination of the judicial interpretation which has been accorded to, and the legislative history of, such cognates clearly reinforces the conclusion that the only purpose of §1691d(f) was to negate an inference of implied preemption.

The provision is apparently modeled after, *inter alia,* a subsection of the Truth-In-Lending Act, 15 U.S.C. §1610(a):

> "This subchapter does not annul, alter, or affect, or exempt any creditor from complying with, the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this subchapter or regulations thereunder, and then only to the extent of the inconsistency."

An examination of the legislative history of §1610(a) clearly demonstrates that its sole purpose was to negate the inference that the *Truth-In-Lending Act* itself was intended to impliedly preempt state laws in the specified fields — not to render applicable state laws which would otherwise be inapplicable because *other federal laws* have preempted the field. As a report of the Senate Committee on Banking and Currency explained:

> "Section 6(a) [15 U.S.C. §1610(a)] would establish the basic congressional policy that *the bill* does not preempt State consumer credit legislation unless the State provision was inconsistent with the Federal law, and then only to the extent of the inconsistency. This section [15 U.S.C. §1610(a)] sets forth the basic policy that *the Federal statute* [the Truth-In-Lending Act] does not preempt State legislation.

"The original version of S. 5 [the bill containing the Truth-In-Lending Act] said *the act* did not annul State law unless the law was 'directly inconsistent'. The committee bill drops the word 'directly' and adds the further stipulation that inconsistent State laws are annulled 'only to the extent of the inconsistency'. The word 'directly' was dropped because there is no apparent difference between inconsistent or directly inconsistent. The added phrase makes clear that *S. 5* does not preempt an entire body of State law should an inconsistency arise in one case." (S. Rep. No. 392, 90th Cong. 1st Session (1967); emphasis added.)

Another provision which is also modeled after §1610(a) and which is therefore also a cognate of §1691d(f) is a provision of the Real Estate Settlement Procedures Act, 12 U.S.C. §2616 which provides, in pertinent part:

"This chapter does not annul, alter, or affect, or exempt any person subject to the provisions of this chapter from complying with, the laws of any State with respect to settlement practices, except to the extent that those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency."

The stated purpose of the provision, which was introduced into the legislation through a House of Representatives amendment (*see* S. Rep. No. 866, 93rd Cong., 2d Session (1974); H.R. Rep. No. 1177, 93rd Cong., 2d Session (1974)), was, as explained by author of the amendment, Representative Sullivan, merely to avoid any inference that the Act was intended to preempt state law:

"[T]he question may be raised that we *could be preempting* the rights of the states. . . . I think it should be made clear that no preemption of State or local government authority . . . is intended *by this legislation . . . my purpose* in offering this amendment *is to put to rest any*

lingering *doubt* as to *whether the bill we are considering today preempts* the rights of State and local governments." (120 Cong. Rec. 28281 (1974); emphasis added.)

Finally, in *First Federal S. & A., Boston, v. Greenwald,* 591 F.2d 417 (1st Cir. 1979), in which the State of California itself was an *amicus curiae,* the United States Court of Appeals for the First Circuit was presented with the same argument concerning the effect of §2616 upon the subject of "escrow funds" that the Secretary is presenting here concerning the effect of §1691d(f) upon "fair lending" practice: that the provision subjects federal associations to the application of state law in the area. The Court of Appeals for the First Circuit, however, flatly rejected the argument, explaining:

"The Commissioner argues that RESPA §18, 12 U.S.C. §2616, undermines the preemptive effect of 12 C.F.R. §545.6-11(c). The argument is that §2616 affirmatively 'permits the operation of state laws regulating settlement practices except as they are inconsistent with RESPA,' that the payment of interest on escrow accounts is a 'settlement practice,' and that therefore §2616 affirmatively permits state statutes such as Mass. G.L.c.183, §61. Since a federal statute affirmatively permits the Massachusetts interest requirements, the argument goes, a Bank Board regulation cannot invalidate the state law.

"The Commissioner reads §2616 far too broadly. On its face §2616 only states that '*This chapter* does not annul, alter, or affect, or exept any person [from] the laws of any State with respect to settlement practices. . . .' [Emphasis added]. Thus, §2616 relates solely to the preemptive effect of 12 U.S.C. ch. 27, which consists only of RESPA. Section 2616's scope does not extend to 12 C.F.R. §545.6-11(c), as it was promulgated by the Bank Board pursuant to the Home Owners' Loan Act, 12 U.S.C. §1464(a), and not pursuant to RESPA." (591 F.2d 426.)

In summary, the Secretary is, in effect, attempting to take a "shield" provided by ECOA to preclude the contention that *it* displaces state law and to use that "shield" as a "sword" to impose state law where it would not otherwise be applicable. He may not do so.

b. *The Effect of Title VIII*

While the Secretary's argument that federal law explicitly subjects the "fair lending" practices of federal associations to state law rests principally upon ECOA, he also relies upon a provision of the Civil Rights Act of 1968, 42 U.S.C. §3615 [erroneously referred to in the "Jurisdictional Statement" as §3616], which provides that "nothing in the Act [the Civil Rights Act of 1968] should be construed to invalidate or limit any law of a state or political subdivision of a state, or of any other jurisdiction in which this subchapter shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter". ("Jurisdictional Statement", p. 20.) Again it is obvious that, as with the corresponding provision of ECOA, the function of the statute is merely to negate an inference that the Act in which it is contained impliedly preempts state law — not to impose state laws which would otherwise be inapplicable.

3. **The Home Mortgage Disclosure Act Preempts The State "Fair Lending" Law Insofar As It Deals With The Maintenance And Public Disclosure By Federal Associations Of Records Concerning The Geographical Distribution Of Loans.**

A federal statute, The Home Mortgage Disclosure Act ("HMDA"), 12 U.S.C. §2801 *et seq.*, preempts the state "fair lending" law insofar as it deals with the maintenance and public disclosure by all federally chartered financial institutions of information concerning the geographical distribution of loans. *National State Bank, Elizabeth, N.J. v. Long,* 469 F.Supp. 1068, 1073-1074 (D.N.J. 1979). Indeed, the Secretary himself comes close to so conceding. (See "Jurisdictional Statement", p. 21.)

As set forth in §IV B.1. and 2., *supra,* the judgment of the Court of Appeals that HOLA and the regulations of the Board promulgated thereunder preclude the Secretary from imposing upon federal associations the procedural requirements of the state "fair lending" law is correct. Even assuming, *arguendo,* however, that the Court of Appeals erred in its interpretation and application of HOLA, the judgment would still be correct in its result and therefore properly affirmable to the extent that the Secretary was attempting to compel federal associations to comply with provisions of the state "fair lending" law dealing with the maintenance and disclosure by the federal associations of information dealing with the geographical distribution of loans.

C. ***The Interjection Into The Within Appeal By Amici Curiae Of The Assertion That The Federal Savings and Loan System Itself Is Unconstitutional Makes A Summary Disposition Of The Appeal Particularly Urgent.***

The attorneys general of twenty eight states (or territories), acting as *amici curiae,* have asserted in their brief in the within appeal that the federal savings and loan system is unconstitutional. ("BRIEF OF AMICI CURIAE" pp. 8-9.) The assertion is, of course, preposterous (see, e.g., *Fahey v. Mallonee,* 332 U.S. 245 (1947)); but the very existence of the assertion threatens the well-being of the federal savings and loan system and makes a summary disposition of the appeal imperative. (For a discussion of the possible impact of the assertion upon federal associations and therefore upon the availability of mortgage credit, see "BRIEF OF THE AMERICAN SAVINGS AND LOAN LEAGUE AS AMICUS CURIAE IN SUPPORT OF MOTIONS OF APPELLEES TO DISMISS OR AFFIRM", pp. 7-9).[23]

[23] Why some of the attorneys general have even elected to participate as *amici curiae* in the within appeal is inexplicable, since approximately forty percent of them represent states that do not even have state "fair lending" laws.

V

CONCLUSION

The purported appeal should be dismissed on the ground that the judgment of the Court of Appeals is not appealable or, alternatively, it should be affirmed on the ground that it is manifestly correct and therefore does not present a question which is sufficiently substantial to warrant argument.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-923

ALAN L. STEIN, AS SECRETARY OF THE BUSINESS AND TRANSPORTATION AGENCY OF THE STATE OF CALIFORNIA,

Appellant,

vs.

CONFERENCE OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS, a California corporation, etc., and FEDERAL HOME LOAN BANK BOARD,

Appellees.

On Appeal From the United States Court of Appeals for the Ninth Circuit

APPELLANT'S REPLY TO MOTIONS TO DISMISS OR AFFIRM APPEAL

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APPELLANT'S REPLY TO MOTIONS TO DISMISS OR AFFIRM APPEAL

In November of 1979, Appellant filed his jurisdictional statement. Amici briefs have been filed in support of that jurisdictional statement by the NAACP Legal and Educational Fund, Inc. and by the Attorneys General of twenty-eight states.

The so-called "Non-Governmental Appellees", representing the federal savings and loan associations, have filed a motion to dismiss or affirm the appeal. The Federal Home Loan Bank Board ("Board") belatedly filed its motion to affirm the appeal. The American Savings and Loan League (which includes many of the same entities that comprise Appellee Conference of Federal Savings and Loan Associations) filed an amicus brief in support of the motions to dismiss or affirm.

Appellant shall briefly respond to some of the points raised by the Appellees in their motions. It is important, however, to recognize at the outset that this case involves only one issue—an issue which Appellant and other states contend is important and has not been addressed heretofore by this Court. That issue is whether state antidiscrimination and antiredlining laws may be applied to federally chartered institutions or whether such application of those laws is preempted by federal statutes. Neither of the Appellees suggests that the issue is unimportant or that it has been decided by this Court. Indeed, the many cases and conflicting congressional debates cited by the parties reinforces Appellant's position that the issue in this case is not only of great significance, but requires resolution by this Court at this time.

I. STATEMENT OF CASE BY NON-GOVERNMENTAL APPELLEES.

The so-called "Non-Governmental Appellees" commenced this action in federal court alleging that the court "has original subject matter jurisdiction of this complaint under 28 U.S.C. Section 1337, inasmuch as this complaint arises under an Act of Congress regulating commerce, i.e., the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. Section 1461, *et seq.* (hereinafter 'HOLA'). . . ." CR at 2.

In their "Notice of Motion and Motion For Entry of Final Judgment," these same appellees asserted, "Plaintiffs have set forth the simple legal issue whose resolution will determine the law applicable to non-discrimination in their lending operations. This matter, while not complex, is of such vital importance—both to the Plaintiff Federal Associations and to the public—that it should be resolved finally and without delay." CR at 130.

In their Notice of Motion and Motion For Partial Summary Judgment on Behalf of Plaintiffs, these same appellees asked the court for a declaratory judgment that the state law

could not be applied "by reason of Article VI, clause 2, of the United States Constitution, and Section 5 of the Home Owners' Loan Act of 1933, as amended. . . ." CR at 90.

The judgment of the court was to grant declaratory relief "on the issue of federal pre-emption." CR at 1139. Both the District Court and the Court of Appeals in this case based their decisions on the doctrine of federal pre-emption. *See* Jurisdictional Statement, Appendix at 2, 11, 22.

For these same appellees now to suggest for the first time that there is an issue of whether under California law, the California statute applies to federally chartered institutions (Motion of Non-Governmental Appellees to Dismiss or Affirm Purported Appeal at 11-12, 26-27) demonstrates a cynical effort to invent nonexistent issues so as to discourage this Court's consideration of the case. The Board made no such contention. Indeed, the Board moves only to affirm—it does not move to dismiss. Moreover, the California Act could not be clearer. It specifically applies to any "financial institution" which is defined as including "any bank, *savings and loan association*, or *other institution* in this state . . . that regularly makes, arranges or purchases loans. . . ." Cal. Health & Safety Code § 35805(c) (emphasis added).

Non-Governmental Appellees refer to a 1974 opinion of the General Counsel of the Board concerning redlining. That opinion suggested redlining was illegal under federal law if it could be shown that discrimination resulted. CR at 310[1]. But

[1] The NAACP Legal Defense and Educational Fund, Inc. disagrees with the assertion by Non-Governmental Appellees (p. 5 of their motion) that "The Board has for many years prohibited 'redlining,' . . . ." *See* Brief Amicus Curiae for the NAACP Legal Defense and Educational Fund, Inc. (filed with the Court of Appeals) at 1-4. The statement of the Amicus American Savings and Loan League in its Amicus brief (p. 4) that California has agreed that the California law does not apply to National Banks is false. The parties simply came to an agreement that the Comptroller would in effect enforce state law. The state expressly reserved its position that its law applied to National Banks. This demonstrates the importance of the case to all financial institutions.

more important, Appellees failed to disclose that in that opinion the General Counsel stated that "Section 528.2(d) (Board anti-discrimination regulation) is based on title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§ 3601 *et seq.*) and certain provisions of the Civil Rights Act of 1966 (42 U.S.C. §§ 1981, 1982) . . . ." There was no mention of the Home Owner's Loan Act ("HOLA"), 12 U.S.C. §§ 1461-1470. Of course, the Civil Rights Act of 1968 expressly permits the states to enact antidiscrimination provisions. 42 U.S.C. §§ 3610, 3615.

Appellees refer to a Board "regulation" (CR at 311) promulgated during this litigation which purports to preempt state law. In fact that regulation is a "resolution" that "does not impose any new obligations". *See* Reply To Amicus Curiae Brief in the Court of Appeals by Appellees, Exhibit E. That resolution does not have the effect of substantive law. *Chrysler Corp. v. Brown*, 441 U.S. 281, 294-309 (1979). The courts below did not rely upon such a resolution but rather interpreted federal law themselves.

Moreover, the 1978 Board regulations were not the basis of the lower court opinions. There is no showing that state law is inconsistent or interferes with those regulations. Rather, the lower courts held that HOLA occupies the field so that state law cannot be applied to federal associations, even though those state laws do not deal with the internal operations of federal associations and are uniform and nondiscriminatory.

II. ERRONEOUS STATEMENTS OF APPELLEE BOARD.

The Board asserts that its regulations list HOLA as the source of its authority to issue regulations. The Board omits to point out that in enacting the regulations, the Board itself stated it was implementing or relying upon ECOA and Title VIII. *See, e.g.*, citations in Motion of Federal Home Loan Bank Board to Affirm; Jurisdictional Statement at 15. Indeed, as noted *supra*, in a Board opinion the Board lists only Title VIII as its source of

authority. If the statutes establishing federal agencies permit those agencies to proscribe redlining, why then does the Congressional history of ECOA suggest that that law was enacted, in part, to deal with redlining? *See* Jurisdictional Statement at 16-17.

The Board stated in its motion that the Court of Appeals "determined that the resulting maze of state, local and federal rules would conflict with the Board's statutory mandate to provide a uniform national standard for the lending practices of federal savings and loan associations. . . ." There is no such statement in the Court of Appeals' opinion. Nor could there be, for no mandate exists for such a uniform standard and no evidence of a maze of state or local rules or of any conflict between state or local law has been presented.

The Board suggests in its motion that Appellant's "principal contention . . . is that the ordinary rule that HOLA preempts all state regulation of federal savings and loan associations is inapplicable in the case . . ." because of ECOA and Title VIII. That statement is, at the very least, misleading. Appellant contends that state laws proscribing discrimination do not constitute the "regulation" of federally chartered institutions any more than do labor laws, equal employment laws, tort laws or real property laws. But if such anti-discrimination laws do constitute a "regulation" of such institutions, nothing in HOLA suggests that the Board has exclusive authority with respect to anti-discrimination.

The Board states in its motion that its exclusive authority concerns "only the credit practices and business affairs of federal associations." Why is lending discrimination a "business affair," but employee discrimination, zoning, liability in connection with projects as to which loans are made, tort liability, wages and hours, loan collection practices and the recording of instruments not? The illogic and resulting confusion of the Board's position is thus manifest.

The Board asserts that in ECOA, Congress gave the Board authority to enforce its requirements. Congress also gave many other agencies such authority. 15 U.S.C. § 1691c. Does that mean that state antiredlining laws do not apply to any entities regulated by any of those agencies (including federally insured, but state chartered, savings and loan associations that are regulated by the Board)? Congress in ECOA also gave the states authority to regulate in the area of anti-discrimination. 15 U.S.C. § 1691d(e)-(g). Indeed, Congress even specified that the states should be involved in anti-discrimination efforts. 42 U.S.C. §§ 3608, 3610, 3616.

Moreover, contrary to the Board's contention, there are provisions in federal law to exempt federal associations from enforcement activities under ECOA if the Board of Governors of the Federal Reserve System is satisfied that there will be "effective enforcement of the state law regarding such creditors." Regulation B of ECOA, Supplement I, at n. 4.

Thus, it is obvious that ECOA provides that federal associations are subject to state laws.

III. THE COURT OF APPEALS DID HOLD A CALIFORNIA STATUTE INVALID AS REQUIRED BY 28 U.S.C. § 1254(2).

Nongovernmental Appellees seek to establish that 28 U.S.C. § 1254(2) does not apply despite clear authority to the contrary. *Minnesota v. Northern States Power Co.,* 405 U.S. 1035 (1972), *aff'g.* 447 F.2d 1143 (8th Cir. 1971); R. Stern & E. Gressman, Supreme Court Practice, 64-65 (5th ed. 1978).[2]

[2] Even if the case is not appropriate for an appeal under 28 U.S.C. § 1254(2) the Court should treat the jurisdictional statement as a petition for certiorari. 28 U.S.C. § 2103 Appellant contends that the matter is properly before this Court as an appeal, but even if reviewed as a writ of certiorari, the issue is deserving of consideration by the Court.

The court of appeals made it clear that it was invalidating a portion of state law by virtue of the preemption doctrine. The court stated, "Appellees argue and the district court held that the state act does not apply to federal savings and loan associations since the field of regulatory control is preempted by federal regulations. . . . It is the regulatory authority of appellant over the federal associations in these respects that is here in dispute. . . . The broad regulatory authority over the federal associations conferred upon the Bank Board by HOLA does wholly pre-empt the field of regulatory control over these associations." Jurisdictional Statement, Appendix at 1-10.[3]

The cases cited by appellees are inapplicable. The parties apparently did not appeal to this Court from the decision in *Rath Packing Co. v. Becker,* 530 F.2d 1295 (9th Cir. 1975), but rather petitioned for certiorari. *See* 425 U.S. 933 (1976). This does not suggest that an appeal could not have been taken.

In citing *Minnesota v. Alexander,* 430 U.S. 977 (1977), Appellees omitted significant portions of the dissenting opinion of Mr. Justice Stevens, with whom Mr. Justice Marshall and Mr. Justice Rehnquist joined. Mr. Justice Stevens stated, "The Court today refuses to review this ruling despite the fact that the case is here on appeal, and may well be within our mandatory jurisdiction." 430 U.S. at 977. In the full footnote, cited in part by Appellees, Mr. Justice Stevens pointed out that the Supreme Court had held that there was appellate jurisdiction to review the question of whether a state taxing statute involved federal governmental immunity from state taxation and that "a similar result should apply to a holding that a state statute invaded the Federal Government's immunity from

[3] *See First Fed. Sav. & Loan v. Greenwald,* 591 F.2d 417, 425 (1st Cir. 1979) which held that a state statute did not apply to federal associations; the court stated "the Supremacy Clause requires the *invalidation of any state law* that either falls within an area exclusively occupied by federal law or actually conflicts irreconcilably with a federal law." (Emphasis added.)

unconsented state regulation." *Id.* at n.1. Here we do not deal with Governmental immunity, but federal preemption of a portion of a state statute—which in effect invalidates a portion of the statute.

It cannot be argued in the instant case that the court of appeals did not make clear its invalidation of the statute as to the federal associations. As noted above, both the district court and the court of appeals expressly ruled that the application of the California Act to the federal associations was preempted, therefore clearly invalidating a portion of a significant state statute.

Moreover, as noted above, there has never been any argument or doubt that the California Act applied to federal associations. It applies to "any bank, *savings and loan association* or *other* [*credit granting*] *institution* in the state. . . ." Cal. Health & Safety Code § 35802(c). (emphasis added) Certainly that definition would include federal savings and loan associations.[4]

IV. THE APPEAL PRESENTS A SUBSTANTIAL QUESTION.

Non-Governmental Appellees' argument seems to be that there are a number of cases in which courts have held that there is preemption. As noted in the Jurisdictional Statement, there

[4] Appellees' reference to the Financial Code is misplaced. Under the California Financial Code, the state regulates state savings and loan associations. The Financial Code provides to federal associations "all rights, powers, and privileges, and . . . exemptions and immunities" granted state associations. Cal. Fin. Code § 14000. Here we deal with the California Health and Safety Code which concerns discrimination and other nonfinancial regulations. Indeed, in California state appellate courts the issue of federal preemption of state laws applicable to financial institutions had either never been raised, *see Garrett v. Coast & Southern Fed. Sav. & Loan Ass'n,* 9 Cal. 3d 731, 108 Cal. Rptr. 845; 511 P.2d 1197 (1973), or had been decided adversely to the federal associations, *Larwood v. San Diego Fed. Sav. & Loan Ass'n,* 185 Cal. App. 2d 450, 8 Cal. Rptr. 362 (1960).

are many cases in which state law has been applied to federally chartered savings and loan associations. [5]

As the Oregon Supreme Court stated in a preemption case, "One point that may 'excuse' the apparent confusion and inconsistency in the cases in [*sic*] that the particular circumstances of each case are of compelling importance in reaching a decision." *Derenco, Inc. v. Benj. Franklin Fed. Sav. & Loan Ass'n,* 281 Or. 533, 577 P.2d 477, 483 (1978). That court derided the oft-cited language of *People v. Coast Federal Sav. & Loan Ass'n,* 98 F.Supp. 311, 316 (S.D. Cal. 1951), that Board regulations concern all aspects of federal association "from its cradle to its corporate grave" by stating it "only proves it pays to turn a phrase." 577 P.2d at 485.

In the instant case, the State has dealt with discrimination by applying its law to all financial institutions doing business in California. Federal statutes explicitly permit the state laws in the area. On the basis of the facts and laws in this case, there should be no preemption.

Appellees contend that the non-preemption provisions in federal civil rights statutes only apply to the application of those statutes and do not manifest non-preemption by other laws such as HOLA. This contention is erroneous.

[5] In addition to the cases cited in the Jurisdictional Statement see also *Johnson v. First Fed. Sav. & Loan Ass'n,* 418 F.Supp. 1106, 1109 (E.D. Mich. 1976) (expressed doubt about preemption). There are many cases in which state law has been applied to federal association even though the issue of preemption was never raised. *E.g., Patton v. First Fed. Sav. & Loan Ass'n,* 118 Ariz. 473, 578 P.2d 152 (1978); *Nichols v. Ann Arbor Fed. Sav. & Loan Ass'n,* 73 Mich. App. 163, 250 N.W. 2d 804 (1977); *Continental Fed. Sav. & Loan Ass'n v. Fetter,* 564 P.2d 1013 (Okla. 1977); *First Southern Fed. Sav. & Loan Ass'n v. Britton,* 345 So. 2d 300 (Ala. App. 1977); *Bellingham First Fed. Sav. & Loan Ass'n v. Garrison,* 87 Wash. 2d 437, 553 P.2d 1090 (1976); *Mutual Fed. Sav. & Loan Ass'n v. American Medical Services, Inc.,* 66 Wis. 2d 210, 223 N.W. 2d 921 (1974); *Tucker v. Pulaski Fed. Sav. & Loan Ass'n,* 252 Ark. 849, 481 S.W. 2d 725 (1972).

First, by using non-preemption language in ECOA and the 1968 Civil Rights Act, Congress suggested that state civil rights legislation not inconsistent with federal law would apply. The legislative history set forth in the jurisdictional statement supports Appellant's contention in this regard. The Board's assertion that Congress' failure to enact some non-preemption language in 1974 overlooks the fact that the 1968 Civil Rights Act already precluded preemption with respect to discrimination in lending and that ECOA non-preemption language was added in 1976. 15 U.S.C. § 1691d(f)-(g).

Second, it is uncontradicted that Board antiredlining regulations derive legislative sanction from these civil rights statutes. Appellees contend that listed among the authorizing statutes is HOLA—a statute which does not contain one word about antidiscrimination. But they cannot dispute that the Board derives at least part (if not all) of its authority to enact antiredlining regulations from civil rights statutes that expressly permit state antidiscrimination and antiredlining laws to apply.[6]

Appellees' reliance on *First Federal Sav. & Loan Tax Comm'n,* 437 U.S. 255 (1978), is misplaced. In that case the Court held that a Massachusetts tax could be applied to a federally chartered savings and loan because the state law "was not unfriendly or discriminatory. It applies a single neutral standard to state and federal institutions alike." *Id.* at 258. The same is true of the state law in the instant case.

Non-Governmental Appellees refer to the amici brief of the State of Washington and other Attorneys General as contending that federal laws are unconstitutional. Amici contended that the Court should hold that Congress did not intend preemption, for if there is such preemption there would

[6] This is unlike *First Federal Sav. & Loan Ass'n v. Greenwald,* 591 F.2d 417, 426 (1st Cir. 1979), in which the federal regulations in question were promulgated by the Board pursuant *only* to HOLA and not pursuant to any other statute.

be, according to amici, constitutional issues regarding federalism. In *Hopkins Federal Sav. & Loan Ass'n Cleary,* 296 U.S. 315 (1935), cited by the Board, the Supreme Court found that federal standards for conversion of existing state-chartered institutions were unconstitutional *per se* as an "encroachment upon the reserved powers of the states." 296 U.S. at 335.

V. CONCLUSION.

Appellant has not attempted to rebut all of the point raised by Appellees. The filings demonstrate controversy over a significant legal issue.

Appellant urges the Court to note probable jurisdiction so that the issue may be fully briefed and resolved.

DATED: February 21, 1980

Respectfully submitted,

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I. INTEREST OF AMICI CURIAE

Federally-chartered savings and loan associations are in business throughout the country. They claim to be wholly immune from any state regulation. They are supported and encouraged in this by their federal creator, the Federal Home Loan Bank

Board. Congress has not said that the associations are immune, but the 9th Circuit has done so in this case.

Washington, like California and other states, has anti-discrimination statutes, including one called the Fairness in Lending Act, RCW 30.04.500-.515, which prohibits "redlining". We also are defending a lawsuit to determine whether our Fairness in Lending Act applies to federally-chartered savings and loan associations. *Washington Savings League, et al. v. Chapman*, No. C 78-163S, W.D. Wash. Relying in part on the district court's decision in the instant case, the federal district court in our state has permanently enjoined the application of the Washington law to federally-chartered savings and loan associations. *Washington Savings League, et al. v. Chapman, supra*, Order Granting Permanent Injunction, 24 September 1979. Our motion for a new trial is pending.

A similar case is pending in New Jersey. On 31 October 1979 the United States District Court for the District of New Jersey orally ruled that New Jersey's anti-redlining statute may not be applied to federally chartered savings and loan associations. *Federal Home Loan Bank Board v. Bianchi*, et al., No. 79-1004. The basis for the court's ruling was the 9th Circuit decision in this case.

All states have a vital interest in determining whether they and their citizens are precluded from applying nonconflicting state laws to federally-chartered savings and loan associations. Hence, this

brief amicus curiae, prepared by the attorney general of the state of Washington and joined in by other concerned attorneys general.

II. THE SUPREME COURT SHOULD GRANT A HEARING IN CALIFORNIA'S APPEAL

The Court of Appeals for the 9th Circuit in the instant case said that:

> "The broad regulatory authority over the federal associations conferred upon the Bank Board by HOLA [12 U.S.C. § 1461, *et seq.*] does wholly pre-empt the field of regulatory control over these associations."

The court then held that California could not apply its anti-redlining law to the federally-chartered associations. This was done not because of any conflict between state and federal law, but solely because of a judge-made rule of preemption.

The judge-made rule is that a state may not apply *any* state law to federally-chartered savings and loan associations, whether or not the law conflicts with or inhibits the application of federal law. This judge-made rule of preemption is being applied to state anti-redlining laws despite the fact that Congress has expressly preserved to the states the power to apply their anti-discrimination laws concurrently with federal law. See, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3610(c), 3615; the Equal Credit Opportunity Act, 15 U.S.C. § 1691d (f), and Title VII of the Civil Rights Act of 1964, §§ 706(c), 708, 42 U.S.C. §§ 2000e-5(c), 2000e-7. The policy of *Congress* is to encourage the

states to remain active in the field of anti-discrimination.

A. **False Basis of Total Immunity Theory:**

The theory of the 9th Circuit that federally-chartered savings and loan associations are wholly immune from state law is not based on any language of Congress. It is based wholly on a metaphor in a dictum by a district court judge in 1951. In *People of State of California v. Coast Federal Savings and Loan Association*, 98 F.Supp. 311 at 316 (S.D. Calif. 1951) the Court said:

> The [Federal Home Loan Bank] Board has adopted comprehensive rules and regulations concerning the powers and operations of every Federal savings and loan association *from its cradle to its corporate grave.* (Emphasis added.)

The metaphor has been often repeated, usually as a substitute for legal analysis rather than as an aid to it. The appellant's Jurisdictional Statement cites the cases indicating that the metaphor is not in point because extensive regulation is no longer equated with intent to preempt. We add that the metaphor does not withstand analysis, even on its own terms.

Obviously, numerous areas of the conduct by savings and loan associations are not governed by Federal Home Loan Bank Board (FHLBB) regulations or by the Home Owners Loan Act. For instance, it was necessary for a court to resort to the common law to remedy a breach of fiduciary duty to a federal savings and loan association when its former officers profited from a sale of proxies controlling the association. *Beverly Hills Federal Savings and Loan Association v. Federal Home Loan Bank Board.* 371 F.Supp. 306 (C.D. Calif. 1973). For another example, the Washington Supreme Court has recently affirmed a judgment enjoining a federal savings and loan association from practicing law in this state without a license. *Washington State Bar Association v. Great Western Federal Savings and Loan Association,* 91 Wash.2d 48, 586 P.2d 870 (1978). Regulations of the FHLBB neither permit nor prohibit federal savings and loan associations from practicing law without a license. But if the 9th Circuit's total preemption theory is right, the Washington Supreme Court was wrong.

The total preemption theory is anomalous. Congress has chartered many kinds of corporations and no other kind is immune from state law simply because it is chartered by the federal government. 36 Am.Jur.2d Foreign Corporations § 112 at note 19, § 123 at note 15. National banks are not immune from state law. *Anderson Nat'l Bank v. Luckett,* 321 U.S. 233, 88 L.Ed. 692, 64 S.Ct. 599 (1944).

B. **The Intent of Congress:**

When Congress is acting within its constitutional powers, it may direct that a federal statute operate either concurrently with state law or to the exclusion of state law (preemption). The intent of Congress governs. But the intent of Congress is not to be derived exclusively from what it did in 1933, or what it said in a particular enactment. We should

look at all of what Congress has said on a subject.

Moreover, even an express, strong, and unqualified intent to preempt state law—such as the one found in § 514 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144—must be reconciled with other expressions of the total and current intent of Congress. Thus, in *Bucyrus-Erie Co. v. Department of Ind., Labor and Human Relations of the State of Wisconsin*, 599 F.2d 205, (7th Cir. 1979) the 7th Circuit held that the ERISA preemption clause had to reconciled with the language of Congress in Title VII of the United States Civil Rights of 1964, 42 U.S.C. § 2000e-7 and 42 U.S.C. §2000h-4. After doing so, the Court ruled that a *state* fair employment law applied to Bucyrus-Erie's employee disability benefit plan, notwithstanding that ERISA, with its strong preemption language, also applied.

We are sure that the 7th Circuit would have even less difficulty in reconciling Title VII of the Civil Rights Act with the Home Owners Loan Act (involved in the instant case), which contains no preemption language and which is not as current as ERISA. Yet if the 9th Circuit's "total immunity" reasoning is correct, the states would likewise be barred from enforcing their *fair employment practice* laws on federally-chartered savings and loan associations. The Ninth Circuit has painted itself into this corner by ignoring what Congress has said and relying instead on the cradle-to-the-grave metaphor as a basis for judgment.

The power to regulate federal savings and loan associations is not so exclusively vested in the Federal Home Loan Bank Board that the courts are not able to act. See *Carroll v. Talman Federal Savings and Loan Ass'n of Chicago*, 604 F.2d 1028 (7th Cir. 1979); *Novotny v. Great American Federal Savings and Loan Ass'n*, 584 F.2d 1235 (3rd Cir. 1978) *vacated on other grounds* .....U.S....., 60 L.Ed.2d 957, 99 S.Ct. 2345 (1979), where courts have applied Title VII of the Civil Rights Act of 1964 to federal savings and loan associations. The courts also have applied the federal Equal Credit Opportunity Act to federal savings and loan associations. See *Markham v. Colonial Mortgage Service Co.*, 605 F.2d 566 (D.C. Cir. 1979). Both of those acts of Congress expressly preserve state jurisdiction to regulate concurrently with the federal agencies and courts. This is true also of Title VIII of the Federal Civil Rights Act of 1968 (housing) 42 U.S.C. § 3601-3619, 3631, which the Federal Home Loan Bank Board is implementing in the regulations by which it here claims to have preempted state law. For actions within the scope of these statutes, it is clearly wrong to conclude that because the FHLBB is in the picture the states are not.

C. **Constitutional Issues:**

We thus believe that Congress did not intend for federally-chartered savings and loan associations to be immune from all state law. Even if such an intent were inferable, however, the Court should

pause to consider constitutional issues before giving effect to it. The constitutional issues are of such grave consequence to our federal system of government that this court, we believe, should construe the statutes to avoid raising them even if the inference of preemptive intent were strong. We will here simply identify those issues, because we are asking the Court to *avoid* ruling on them by construing the statutes as not immunizing federally-chartered savings and loan associations from all state law.

(1). **Constitutionality of Chartering:**

We have found no reported decision adjudicating whether Congress acted within its delegated powers when it provided for federal chartering of savings and loan associations in their present form. The United States Supreme Court has never passed on the issue. One circuit court of appeals addressed constitutional issues in a case which involved a prior form of federal savings and loan association of which the United States government held majority ownership. *First Federal Savings and Loan Association of Wisconsin v. Loomis*, 97 F.2d 831 (7th Cir. 1938). There the Court, in a split decision, rejected the claim that Congress' reliance on its fiscal powers as a basis for chartering savings and loan associations was a pretext. The majority in that case also said that Congress might charter such associations in exercise of its power to spend for the general welfare—that is, as a means of funneling money from the United States treasury to a credit-starved public in

the depths of the great depression.

Notably, however, the United States government no longer has any ownership interest in federal savings and loan associations, nor does it use them to funnel dollars from the U.S. Treasury to the public. Federal savings and loan associations at this time are nothing but private businesses, and this is all that they are intended to be under current law.

This Court has held that Congress may charter corporations for the purpose of carrying out a program that is within the power of Congress to institute. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819). The justifying function of the Bank of the United States, creation of which was approved in *McCulloch v. Maryland*, was to manage the monetary policy of the United States, the present function of the Federal Reserve System. But this Court has never held that Congress has the power to charter corporations simply to do business. Perhaps there is a public benefit from the availability of federal as well as state-chartered savings and loan associations (although the need for them at this time is not evident). But the same thing could be said of federally-chartered corporations to manufacture automobiles, to build houses (why stop at financing them?), or to practice law.

If Congress has the power simply to charter corporations for the general welfare, that power has no logical limits—and its exercise will be economically irresistible if the federally-chartered corporations are all immune from state law.

(2). **Constitutionality of Immunity:**

If Congress has power to not only charter business corporations but to immunize them from *all* state law, the shift of power from the states to the central government will be revolutionary. Congress could immunize any business from state law simply by granting it a federal charter (under circumstances implying that Congress intends to "occupy the field.") But if Congress can do this through the means of chartering corporations, why can it not prevent state regulation of a "field" of business by direct legislation? After all, this Court in *McCulloch v. Maryland* approved of the creation of corporations as a *means* Congress may use to achieve a permissible end. If the permissible end is to free businesses of the bother of complying with general state laws, then that end can be achieved directly by a simple act of Congress; *e.g.*, as follows:

> "The Congress hereby finds that the general welfare will be served by (that the regulation of interstate and foreign commerce requires) freeing business from state law. It is therefore enacted that the field of regulation of business is preempted, and hereafter no business (no person?) need comply with any law of any state wherein it is located or where it does business."

It is no answer to say that Congress respects our nation's traditions and would never do this. That would be like saying that no means of removing a president from office are necessary, because no one elected by the people for that high office would abuse his power. When laying down constitutional prin-

ciples, one must assume that an entity that has a power will use it.

III. CONCLUSION

The State of Washington and the other states joining in this brief ask that the preemption issue be decided by this Court in an opinion after argument. We are confident that this Court, undazzled by the cradle-to-the-grave metaphor, will decide the issue through the analysis of precedents and the application of sound public policy. If that is done, the Court should conclude, as it has for every other kind of federal corporation, including national banks, that the associations are not immune from all state law.

If the Ninth Circuit decision is left standing, there will be uncertainty and litigation throughout the country as to whether any state law can be applied to a federal savings and loan association. The uncertainty and litigation will continue until this Court speaks. We ask the court to settle the issue now.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-923

ALAN L. STEIN, AS SECRETARY OF THE BUSINESS AND TRANSPORTATION AGENCY OF THE STATE OF CALIFORNIA,

Appellant,

v.

CONFERENCE OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS, a California corporation, etc., and FEDERAL HOME LOAN BANK BOARD,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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On Appeal From The United States Court Of Appeals For The Ninth Circuit

==========

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND STATEMENT OF INTEREST OF AMICUS

==========

The N.A.A.C.P. Legal Defense and Educational Fund, Inc. moves this Court, pursuant to Rule 42(3) of the Rules of the Supreme Court for the United States, for leave to file brief amicus

curiae.[1/] The reasons for so moving also disclose the interest of the amicus. While the Legal Defense Fund recognizes that this Court does not look with favor upon filing amicus curiae briefs in support of jurisdictional statements, two extremely important issues in this case were not emphasized in any of the briefs below. The brief accompanying this motion is limited to summary discussion of those two points.

The issue presented by the instant appeal, whether regulations against redlining promulgated by the Federal Home Loan Bank Board pre-empt the application of California's Housing Financial Discrimination Act of 1977 to federal savings and loan associations in California, is one of general importance and vital concern to amicus, a non-profit corporation that seeks to eliminate racial discrimination through legal means. The California statute here at issue, Cal. Health & Safety Code §35800 et. seq. (West Supp. 1979), is an important one which expressly addresses the perpetuation of racially segregated neighborhoods by redlining, §35801(e)(7), and prohibits discrimination in lending on the basis of race, §35811, or racial composition of neighborhood, §35812.

1/ The Federal Home Loan Bank Board consented to the filing of the brief. The Conference of Federal Savings and Loan Associations declined to give its consent.

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation established under the laws of the State of New York. It was founded to assist black persons to secure their constitutional and statutory rights by the prosecution of lawsuits.

A primary aim of the Legal Defense Fund is to secure the right of black citizens to live in stable, integrated neighborhoods. Redlining inhibits the freedom to live where one wants, for the absence of mortgage money makes impossible the purchase of homes in such areas. Moreover, redlining causes stable areas to deteriorate, through lack of investment. It is therefore of the utmost importance that prohibitions against redlining, including California's anti-redlining legislation, be effective.

Amicus has a more specific interest which grows out of a 1976 case in the United States District Court for the District of Columbia, National Urban League, et al. v. Office of the Currency, (No. 76-718), in which amicus, as one of plaintiffs' counsel, negotiated a Settlement Agreement with the Federal Home Bank Board by which it agreed to promulgate new regulations

against redlining in compliance with its obligations under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601 et seq. Those regulations contain the federal prohibition against redlining and the enforcement machinery on which turn the claims in the instant case. Amicus submits that those regulations should not pre-empt or interfere with state prohibitions against redlining by federal savings and loan associations and that the National Urban League Settlement Agreement should not be used as a weapon to frustrate the goal of eliminating redlining through complementary state and federal enforcement.

The opinion of the United States Court of Appeals for the Ninth Circuit affects the legal rights of black persons as well as the enforcement by state and local governments of rights which the United States holds important and which by federal statute have been placed under joint federal-state protection.

Wherefore, movant prays that the attached brief amicus curiae be permitted to be filed with the Court.

Respectfully submitted,

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On Appeal From The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE

ARGUMENT

1. The Anti-Redlining Regulations of the Federal Home Loan Bank Board are Grounded in Federal Civil Rights Statutes; the Decision Below, in Holding Otherwise, Endangers Continued Federal-State Co-operation in Enforcing Anti-Discrimination Legislation.

In holding that the Home Owners' Loan Act of 1933, 12 U.S.C. §§ 1461-1470, ("HOLA") pre-empted the entire field of regulatory control over federal savings and loan associations, the Ninth Circuit ignored specific anti-pre-emption provisions of federal anti-discrimination statutes.

Amicus suggests that, in so doing, the court below misconceived the nature of the Federal Home Loan Bank Board's statutory authority for the promulgation of anti-redlining regulations.

HOLA is a comprehensive statutory scheme that was enacted to alleviate, through creation of a federal savings and loan system, severe economic hardships faced by mortgage debtors during the Great Depression. The statute does not in any way address racial discrimination in lending. Fundamental to the holding that the grant of regulatory authority given to the Federal Home Loan Bank Board ("Board") by HOLA pre-empts the applicability of California's anti-redlining legislation to federal savings and loans is the notion that the Board's authority to issue anti-redlining regulations is based upon HOLA, rather than upon the specific anti-discrimination provisions of Title VIII and the Equal Credit Opportunity Act (ECOA). But both Title VIII and ECOA apply to the Board and contain specific provisions against the pre-emption of state anti-redlining legislation. 42 U.S.C.§3615; 15 U.S.C. §1691d(e). The holding of the Ninth Circuit directly frustrates Congress' express intention to supplement federal anti-discrimination efforts with state efforts.

The Board itself issued its regulations pursuant to those civil rights statutes. The Board's first prohibition in 1972 against discrimination in lending was adopted "implementing Title VIII of the Civil Rights Act of 1968 (the Federal Fair Housing Act)." See 42 Fed. Reg. 58954. In announcing in November, 1977 the strengthened regulations now in effect, the Board explained that they were "for monitoring the Equal Credit Opportunity Act (ECOA), Title VIII of the Civil Rights Act of 1968, and other civil rights statutes which the Board enforces." 42 Fed. Reg. 58182. Finally, in its announcement promulgating these regulations, the Board explained that it adopted them "to update and strengthen its nondiscrimination-in-lending regulations and policy statement which reflect provisions of the Federal Fair Housing Act, the Equal Credit Opportunity Act (ECOA), and the Community Reinvestment Act (CRA)." 43 Fed. Reg. 22332.

Even to the extent that the Board's redlining regulations derived in part from HOLA, Congressional intent concerning civil rights cannot be rejected. As with any other issue of statutory construction and legislative intent, the more narrowly drawn provisions of the civil

rights statutes, upon which the regulations are based explicitly, control to the extent that they conflict with more general provisions of HOLA. Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1961). Moreover, even if the statutes were of equal specificity, the more recent provisions of Title VIII and ECOA should be construed as a continuation of HOLA in so far as they speak, not inconsistently, to the same issues as HOLA. Posadas v. National City Bank, 296 U.S. 497, 503 (1936). As HOLA does not specifically address discrimination in lending, it is not inconsistent with Title VIII and ECOA provisions on the subject, and therefore HOLA should not, as a matter of statutory construction, supersede the latter two.

There are, in addition, strong policy reasons for not allowing HOLA to pre-empt the state regulations. The overall statutory mechanism for combatting redlining by federal savings and loan associations would suffer if the California provisions, based upon intimate knowledge of local conditions, were inapplicable. Furthermore, a precedent dangerous to the enforcement of all state anti-discrimination legislation would be allowed to stand if HOLA, a statute that does not

address discrimination, were allowed to supersede the specific provisions against pre-emption in applicable federal civil rights legislation. Joint federal-state enforcement is common to a wide range of civil rights legislation. Such a result would be counter to this Court's reluctance to infer pre-emption, Exxon v. Governor of Maryland, 437 U.S. 117, 132 (1978) and Congress' repeated desire to enlist state and federal power against discrimination. See, e.g., 42 U.S.C. §3616; 15 U.S.C. §1691d(f).

II. The Decision of the Court of Appeals Below Effectively Denies to Blacks the Substantive Protections of California's Anti-Redlining Statute Without Considering or Ruling on the Issue of Whether Such Rights are Pre-empted.

The Court of Appeals distinguished between the substantive provisions of the California Housing Financial Discrimination Act of 1977 ("the Act"), "those conferring substantive rights upon borrowers to be free from discriminatory practices in the lending of money or extending of credit," and the Act's procedural provisions, "those providing for regulatory control over the lending institutions to insure that the substantive rights of borrowers are respected."

Since the Complaint sought only a declaration that the Act was pre-empted by HOLA and an injunction against California's enforcement of the Act, the Ninth Circuit solely held that the procedural provisions of the Act were pre-empted. It did not formally consider the issue of pre-emption of the substantive provisions. Neither did the Court rule on whether, in light of the holding that the state was pre-empted from enforcement of its statute, the federal regulatory agency was obligated to enforce the substantive provisions of the state statute as to federal savings and loan associations in California. Amicus contends that the Court of Appeals' attempt to bifurcate the issue of pre-emption is illusory and ignores the realities of California's statutory scheme. As a practical matter, the opinion below reaches beyond procedure and regulation. It denies black individuals the substantive protection against redlining to which they are statutorily entitled by California law without having had the issue of the pre-emption of such rights properly litigated.

According to California's Housing Financial Discrimination Act of 1977, borrowers alleging discriminatory treatment can only obtain judicial review after filing a complaint with the

Secretary of California's Business and Transportation Agency, and after a formal administrative hearing concerning the Secretary's handling of the complaint. Cal. Health & Safety Code §§35820-35823. The Act does not authorize direct judicial review of alleged violations of substantive rights, but rather makes enforcement of such rights dependent upon the borrower's awareness that judicial review must be preceded by both an administrative complaint and an administrative hearing.

Failure to know that one must exhaust administrative remedies effectively precludes a consumer from vindicating his or her right to be free from discrimination in lending. The California Act compels financial institutions to give potential borrowers notice not only of the kinds of discriminatory practices prohibited, but also of the mechanism for securing review of any alleged discrimination. Cal. Health & Safety Code §35830. It is this notice provision that prompted the filing of this action and which the Ninth Circuit held was pre-empted. Absent such notice, most potential borrowers will not, in all probability, ever become aware of their substantive rights. Even if an occasional minority

borrower should accidently learn of the statute, the protection which it was intended to afford is rendered meaningless, because California is precluded from investigating a civil rights violation by federally chartered savings and loan associations, either on the Secretary's own initiative or as a result of the filing by a consumer of a specific complaint.

Without having considered the pre-emption issue as applied to the Act's substantive provisions, therefore, the decision below effectively nullifies any substantive rights under the Act. In view of the practical interrelationship between the procedural and substantive provisions of the Act, amicus suggests that the pre-emption issue before this Court cannot be resolved without full consideration of Congressional intent concerning the substantive rights of racial minorities to be free from discrimination in lending. Congress has declared that any state law which gives greater substantive protection to loan applicants than that provided by ECOA or Title VIII shall not be pre-empted. 15 U.S.C. §1691d(f); 42 U.S.C. §3615. The Court of Appeals below failed either to compare the corresponding provisions of the state and federal anti-redlining legislation

or to consider the extent to which the state and federal provisions are in fact inconsistent.

CONCLUSION

WHEREFORE, Amicus urges the Court to hear oral argument in this case and consider these issues, which are crucial to a determination of whether blacks in California are entitled to the protections of the state prohibition against discrimination in lending.

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No. 79-923

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Appellant,

v.

CONFERENCE OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS, a California Corporation, *et al.*, and FEDERAL HOME LOAN BANK BOARD,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE AMERICAN SAVINGS AND LOAN LEAGUE AS AMICUS CURIAE IN SUPPORT OF MOTIONS OF APPELLEES TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-923

ALAN L. STEIN, Successor in office to RICHARD T. SILBERMAN, as Secretary of the Business and Transportation Agency of the State of California,

Appellant,

v.

CONFERENCE OF FEDERAL SAVINGS AND LOAN ASSOCIATIONS, a California Corporation, *et al.*, and FEDERAL HOME LOAN BANK BOARD

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The American Savings and Loan League ("American League") hereby moves, pursuant to Rule 42(3) of the Rules of the United States Supreme Court, for leave to file

the within "BRIEF OF THE AMERICAN SAVINGS AND LOAN LEAGUE AS AMICUS CURIAE IN SUPPORT OF MOTIONS OF APPELLEES TO DISMISS OR AFFIRM", and as grounds therefor alleges as follows:

I

The American League is a trade association composed of savings and loan associations in the United States which are owned and operated predominantly by Blacks, Hispanics, Orientals, and members of other racial or ethnic minorities. Formed more than 31 years ago, its current membership includes 70 savings and loan associations operating in 24 states and the District of Columbia and having assets in excess of $1.5 billion. More than half of the members are federally-chartered associations. Eighteen of the members are located in California.

II

As a trade association composed of minority owned and operated savings and loan associations, the American League is dedicated to ending the practice of "redlining" and other forms of arbitrary discrimination against racial and ethnic minorities, and promoting the availability of mortgage credit to members of racial and ethnic minorities for the purchase of homes and other real estate. Over the years, the American League has, through lobbying, education, litigation, and other means, vigorously—and effectively—endeavored to achieve these goals.

III

This appeal concerns the respective roles of the Federal Home Loan Bank Board ("Bank Board") and the several states in regulating the mortgage lending practices

of federal associations. In particular, it presents the question of whether the United States Court of Appeals for the Ninth Circuit erred in holding that a federal law, the Home Owner's Loan Act of 1933, as amended, 12 U.S.C. § 1464(a), and the comprehensive body of regulations which the Bank Board has issued thereunder, bars the State of California from enforcing certain procedural requirements of the California "antiredlining" statute (Calif. Health & Safety Code § 35800 *et seq.*) against federal savings and loan associations. Since resolution of this question will affect the ability of members of racial and ethnic groups to secure mortgage credit, it is a matter of material concern to the American League and its members.

IV

The American League is familiar with the contents of 1) the "JURISDICTIONAL STATEMENT" filed by the Appellant in the within appeal; 2) the "BRIEF OF AMICI CURIAE" in support of the Appellant's jurisdictional statement filed by the State of Washington, and joined in by 27 other state (and territorial) attorneys general, which, among other things, questions the constitutionality of the federal savings and loan system; and 3) the "MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC." filed by the N.A.A.C.P. Legal Defense and Educational Fund in support of the Appellant's jurisdictional statement.

V

The American League believes that the decision being appealed of the United States Court of Appeals for the Ninth Circuit ("the Court of Appeals") was legally

correct and in the best interests all of the people of the United States, including members of racial and ethnic minorities. In its *amicus curiae* brief in support of the respective motions of the Appellees to dismiss this appeal or affirm the judgment of the Court of Appeals the American League will argue the following points:

1. The sole issue addressed by the jurisdictional statement of the Appellant, the application to federal savings and loan associations of the California "antiredlining" statute *per se,* is not presented by this appeal.

2. Since the Bank Board has issued and is enforcing a stringent body of "antiredlining" and "antidiscrimination" regulations, allowing the State of California to impose upon federal associations the procedural requirements of the California "antiredlining" statute would not contribute in any meaningful fashion—and, indeed, could be inimical—to the elimination of "redlining" and other discriminatory lending practices.

3. The extreme position taken by one of the amici, questioning the constitutionality of the federal savings and loan system, by casting doubt (however unfounded) on the legal status of federal associations, could have an adverse influence upon their operations and thus impair their ability to provide mortgage credit to the public, including minority group members.

4. Because of its possible precedential effect with respect to the application of state law to other mortgage lending practices of federal associations, particularly the right of federal associations to exercise "due on" clauses in mortgage loan contracts, a

reversal of the judgment of the Court of Appeals could constrict the availability of mortgage credit to minority group members and other economically disadvantaged persons.

VI

The American League believes that argument on the above-referenced points will assist the Court in determining whether or not to dismiss this appeal or affirm the judgment of the Court of Appeals from which the appeal is taken; and the American League is concerned that these points either will not be addressed, or will not be adequately addressed, in the motions to dismiss or affirm that will be filed by the Appellees.

VII

The American League has asked for the consent of all parties to this appeal to the filing of an *amicus curiae* brief. While the Appellees have given their written consent, the Appellant has refused to give his consent except upon conditions.

Wherefore, the American League prays that the attached *amicus curiae* brief be filed.

Respectfully submitted,

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I

INTEREST OF AMICUS CURIAE

The American Savings and Loan League ("American League") is a trade association composed of savings and loan associations in the United States which are owned and operated predominantly by Blacks, Hispanics, Ori-

entals, and members of other racial or ethnic minorities. Formed more than 31 years ago, its current membership includes 70 savings and loan associations operating in 24 states and the District of Columbia and having assets in excess of $1.5 Billion. More than half of the members are federally-chartered associations. Eighteen of the members are located in California.

As a trade association composed of minority owned and operated savings and loan associations, the American League is dedicated to ending the practice of "redlining" and other forms of arbitrary discrimination against racial and ethnic minorities, and promoting the availability of mortgage credit to members of racial and ethnic minorities for the purchase of homes and other real estate. Over the years, the American League has, through lobbying, education, litigation, and other means, vigorously—and effectively—endeavored to achieve these goals.

This appeal concerns the respective roles of the Federal Home Loan Bank Board ("Bank Board") and the several states in regulating the mortgage lending practices of federal associations. In particular, it presents the question of whether the United States Court of Appeals for the Ninth Circuit erred in holding that a federal law, the Home Owner's Loan Act of 1933, as amended, 12 U.S.C. §1464(a), and the comprehensive body of regulations which the Bank Board has issued thereunder, precludes the State of California from enforcing certain procedural requirements of the California "antiredlining" statute (Calif. Health & Safety Code §35800 *et. seq.*) against federal savings and loan associations. Since resolution of this question will affect the ability of members of racial and ethnic groups to secure mortgage credit, it is a matter of material concern to the American League and its members.

II

ARGUMENT

A. The Sole Issue Addressed by the Jurisdictional Statement of the Appellant, the Application to Federal Savings and Loan Associations of the California "Antiredlining" Statute *per se*, Is Not Presented by This Appeal.

In his jurisdictional statement the Appellant asserts that the question presented by this appeal is whether the California "antiredlining" statute *per se* applies to federal associations. Only in a footnote does he acknowledge that the United States Court of Appeals for the Ninth Circuit ("the Court of Appeals") decided only the question of whether the *procedural* aspects were applicable; and he proceeds to dismiss the careful distinction drawn by the Court of Appeals between the procedural and substantive aspects of the statute as "inexplicable". (Jurisdictional Statement, p. 6, footnote 2.)

What the Appellant fails to disclose is that *the State of California drew precisely the same distinction between the substantive and procedural aspects of the California "antiredlining" statute vis-a-vis its application to national banking associations*—associations which have vastly greater assets and are far more important mortgage lenders in California than federal savings and loans associations.

By a letter dated June 19, 1979, the Comptroller of the Currency, in response to efforts by the State of California to apply its "antiredlining" statute to national banking associations, advised the Governor, Edmund G. Brown, that the *procedural* aspects of the California "antiredlining" statute were preempted in the case of

national banking associations by federal law; but that the Comptroller would himself require such associations to comply with the *substantive* provisions of the statute:

> "We have reviewed the law and have concluded that the substantive nondiscrimination provisions contained in (Health & Safety Code) §§35810-12 do apply to national banks. However, the state's enforcement mechanism and complaint resolution process are preempted in the case of national banks by the Comptroller's congressionally-mandated regulatory and supervisory responsibilities.
>
> "We will examine national banks for compliance with the state law substantive requirements and will administratively resolve individual consumer complaints under our established fair housing program. We are instructing the San Francisco Regional Office to advise national banks and national bank examiners of our findings and to develop appropriate examination procedures."

We have been advised that the State of California has acquiesced in the position of the Comptroller that the procedural aspects of the California "antiredlining" statute do not apply to national banking associations.

In short, the distinction drawn by the Court of Appeals between the substantive and procedural aspects of the California "antiredlining" statute is reasonable and has been accepted by the Appellant. Accordingly, the jurisdictional statement of the Appellant, by addressing the question of the application to federal associations of the California "antiredlining" statute *per se,* obviously addresses an issue which simply is not presented by this appeal.

B. Since the Bank Board Has Issued and is Enforcing a Stringent Body of "Antiredlining" and "Antidiscrimination" Regulations, Allowing the State of California to Impose Upon Federal Associations the Procedural Requirements of the California "Antiredlining" Statute Would not Contribute in any Meaningful Fashion—and, Indeed, Could Be Inimical—to the Elimination of "Redlining" and Other Discriminatory Lending Practices.

A basic thesis of both the jurisdictional statement filed by the Appellant and the *amicus curiae* briefs of the attorneys general and the N.A.A.C.P. Legal Defense and Educational Fund, Inc. filed in support thereof is that application of the California "antiredlining" statute to federal associations would materially contribute to the elimination of "redlining" and other discriminatory lending practices.

That thesis, the American League, believes, is spurious.

There is little evidence that discriminatory lending practices are widespread among federal associations in California or elsewhere at the present time. Rather, and whatever the past may be, the American League is gratified at the determined effort that federal associations in general have made in recent years to eradicate discrimination in lending and to increase the availability of mortgage credit to members of the minority community.

To the extent that discriminatory lending practices by federal associations may remain a problem, the Bank Board has issued and is enforcing a stringent body of "antiredlining" and "antidiscrimination" regulations. Moreover, because of its plenary authority over the

operation of federal associations (see 12 U.S.C. §1464(a))—including such matters as association branching and establishment of other offices and facilities[1]—the "leverage" of the Bank Board to enforce compliance with regulations is generally superior to the ability of a state official to enforce compliance with an "antiredlining" state law.[2]

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[1] Under the Community Reinvestment Act of 1977, 12 U.S.C. §§2901-2905, the Bank Board is authorized to take into account the lending record of a federal association, including its service to low- and moderate-income neighborhoods, in evaluating an application by a federal association for a deposit facility. This includes applications for branch offices, remote electronic service units, office location changes, mergers, consolidations, reorganizations, and holding company acquisitions, among others. The possibility of denial by the Bank Board of such applications for poor lending performance in low- and moderate-income neighborhoods, which often are also minority neighborhoods, is a powerful deterrent to redlining by a federal association. The Bank Board's regulations implementing the Community Reinvestment Act appear at 12 C.F.R. Part 563e.

[2] This appeal arises out of a dispute between two sovereigns, the United States of America acting through the Bank Board and the State of California acting through one of its officials, the Secretary of the Business and Transportation Agency of the State of California, over the right to regulate the mortgage lending practices of federal savings and loan associations.

Following enactment of the California "antiredlining" statute, the Appellant (or, more precisely, his predecessor in office) informed federal associations in California that he expected them to comply with the provisions of the California "antiredlining" statute; the Bank Board thereupon issued an opinion that federal law precluded application of the California "antiredlining" statute; and the nongovernmental Appellees in this appeal attempted to secure an orderly resolution of the controversy by filing an action in the United States District Court for the Eastern District of California seeking, *inter alia,* declaratory relief against both the Bank Board and the Secretary of Business and Transportation Agency of the State of California. (*Conference of Federal Savings and Loan Associations, et al. v. Richard T. Silberman etc.,* U.S.D.C. S-78-55 PCW.)

(footnote continues)

Indeed, the existence of concurrent jurisdiction by the Bank Board and the individual states—each with its own independent enforcement process—over "redlining" violations could result in public confusion as to the appropriate enforcement authority that would actually inhibit effective enforcement by the Bank Board and thus be inimical to the elimination of "redlining" and other discriminatory lending practices. The American League would not like to see a situation arise where federal associations in states which do not have effective antiredlining laws attempt to evade the Bank Board's salutary antiredlining regulations on the ground that state law governs this issue.

C. The Extreme Position Taken by One of the Amici, Questioning the Constitutionality of the Federal Savings and Loan System, by Casting Doubt (However Unfounded) on the Legal Status of Federal Associations Could Have an Adverse Influence upon their Operations and Thus Impair Their Ability to Provide Mortgage Credit to the Public, including Minority Group Members.

The federal savings and loan system has been in existence for almost half a century; and during that time it has played a leading and vital role in home financing. Indeed, without the federal savings and loan system, it is

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(footnote continued)

Instead of awaiting the outcome of the federal court action however, the State of California attempted to coerce compliance with the California "antiredlining" statute by bringing a state court action against a single moderate size federal association, West Coast Federal and Loan Association, and 100 "Doe" defendants who were presumably the other federal associations in California, seeking to impose penalties amounting to, on an annualized basis, about one billion dollars a year. (*People, etc. v. West Coast Federal Savings and Loan Association, et al.,* San Mateo County Superior Court No. 220012.)

doubtful that Americans would have the quantity and quality of housing which they presently enjoy. Moreover, federal associations, both minority operated and non-minority operated, have often been in the forefront of efforts to provide mortgage credit to minority group members and others living in mortgage-deprived areas.

Despite the fact that it has existed for almost fifty years and has over $325 billion in assets, despite the enormous contribution which it has made to the well-being of the nation, despite the enormous contribution which it may be expected to make in the future, the attorneys general of 28 states have asserted, in an *amici curiae* brief filed in this appeal, that the federal savings and loan system may not be constitutional. ("Brief of Amici Curiae," pp. 7-10.)

Obviously the federal savings and loan system is *not* unconstitutional and any claim to the contrary is simply irresponsible. Nevertheless, the mere existence of that charge, when made by 28 state (or territorial) attorneys general in a brief before this Court, will necessarily cast doubt about the legal status of federal associations, which could have an adverse influence upon their operations. What will happen, for example, when a federal association attempts to borrow funds on the security of its credit? Will the lender demand an extra premium to compensate it for the additional risk of extending credit to what may be an organization without lawful status? If so, would it still be economically feasible for the association to borrow? Could the association remain competitive with other mortgage lenders, including state-chartered savings and loan associations?

In short, the mere existence of the charge that federal associations are unconstitutional may be harmful to the

operations of federal associations and thus impair the ability of those associations to provide mortgage credit to anyone, including members of minority groups living in mortgage deprived areas.[3] It creates a practical urgency for securing a prompt disposition of the within appeal either by dismissing it or affirming the Court of Appeals' judgment from which it is taken.

D. Because of its Precedential Effect with Respect to the Application of State Law to Other Mortgage Lending Practices of Federal Associations, Particularly the Right of Federal Associations to Exercise "Due On" Clauses in Mortgage Loan Contracts, A Reversal of the Judgment of the Court of Appeals Could Constrict the Availability of Mortgage Credit to Minority Group Members and Other Economically Disadvantaged Persons.

The principal focus of both the Appellant's jurisdictional statement and the *amicus curiae* briefs filed in support thereof is the application of state "antiredlining" statutes to federal savings and loan associations. In fact, however, this appeal presents only one aspect of the broader question of which sovereign, the United States of America, acting through the Bank Board, or the several states, may regulate the mortgage lending practices of federal associations, not merely with respect to "redlining" but with respect to other matters as well; and the disposition of this appeal could have important implications for the resolution of that broader controversy.

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[3] It should be noted that historically the ratio of federal charters to nonfederal associations has been higher for minority associations than for others. Hence, the effect of the charge upon minority savings and loan associations will be even more severe than on savings and loan associations in general.

More particularly, Bank Board regulations, 12 C.F.R. § 545.8-3(f) and (g), subject to specified limitations, explicitly authorize federal associations to exercise "due on" clauses in mortgage loan contracts for the purpose of adjusting the yield on a loan to current market levels when the property (or a sufficient interest therein) is sold or transferred. California law, however, as interpreted by the California Supreme Court in *Wellenkamp* v. *Bank of America,* 21 Cal.3d 943 (1978), prohibits said exercise; and the Appellant contends that the state prohibition applies to federal associations.[4]

The American League believes that the right of federal associations to exercise the "due on" clause for the purpose of adjusting interest rates contributes to the availability of mortgage credit to minority group members and other economically disadvantaged persons. A prohibition against exercise of a "due on" clause tends to perpetuate the existing distribution of mortgage credit. This perpetuation because of the effects of past "redlining" and other discriminatory lending practices, operates to keep credit in areas which already enjoy an abundance of housing funds while inhibiting lenders, whether acting voluntarily or under legal compulsion, from diverting such funds to mortgage-deprived areas.

[4] Indeed, the action originally brought by the non-governmental Appellees in the United States District Court for the Eastern District of California to secure a declaration of rights with respect to the application of the California "antiredlining" statute also sought a declaration that federal law precluded the application of the California law to federal associations. While the two issues were eventually severed, the District Court has determined that federal law does preclude such application; and an appeal by the Appellant to the Court of Appeals is pending.

Thus, because of its possible precedential effect with respect to the application of state law to the right of federal associations to exercise the "due on" clause in mortgage loan contracts, a reversal of the judgment of the Court of Appeals could constrict the availability of mortgage credit to minority group members and other economically disadvantaged persons.

There could be other substantially adverse precedential consequences of weakening an unbroken line of court cases holding that federal law exclusively governs the lending operations of federal savings and loan associations. The Bank Board strictly limits the amount of late charges which may be assessed by federal associations on delinquent borrowers, and allows a 15-day grace period before a late charge may be assessed. See 12 C.F.R. § 545.8-(3)(d) and (e).[5] Most states, however, impose no late charge limitations, or allow a late charge above the limitation imposed by the Bank Board. If the exclusive nature of the Bank Board's Regulations are placed in doubt, efforts could be made to follow state late charge practices. This, in turn, could adversely impact minority groups, since they often are more affected by a down-turn in the national (or regional) economy than are majority groups.

Finally, Congress appears well satisfied with the Bank Board's regulation of federal associations, and has recognized that federal law *exclusively* governs antidiscrimination and lending by federal associations. See 124 Cong. Rec. Senate, October 12, 1978, pp. 18471-18472; 124 Cong. Rec. House, October 5, 1978, pp. 11744-11745.

[5] Prior to August 3, 1979, the Bank Board's due-on-sale and late charge regulations were found at 12 C.F.R. §545.6-11(d)-(g).

III

CONCLUSION

This appeal should be dismissed or, alternatively, the judgment of the Court of Appeals affirmed.

Respectfully submitted,

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